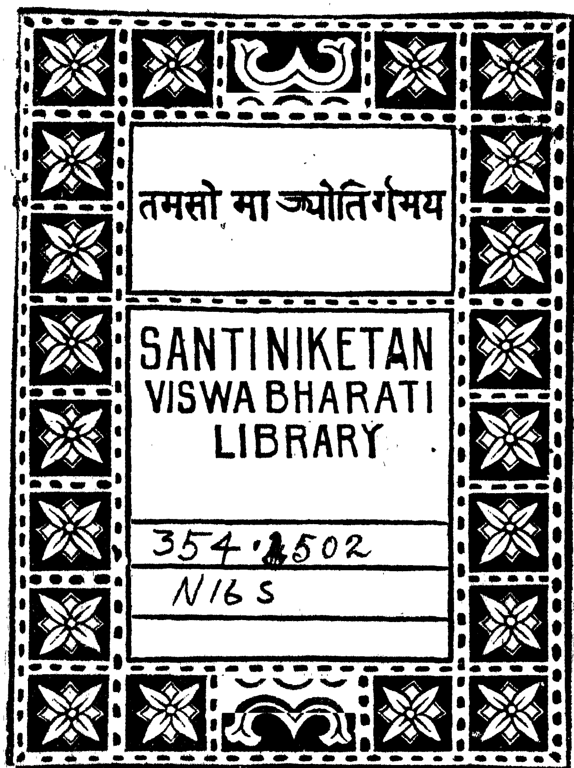

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A MONOGRAPH ON

The Separation of Executive and Judicial Powers

IN BRITISH INDIA

BY

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PREFACE

No apology need be made for writing this Monograph. The independence of the judiciary is an administrative and political problem still awaiting solution. It has been before the country for about a century. People now-a-days are feeling more keenly than ever the absence of independence in the judges who preside over our criminal tribunals. It was confidently expected that with the inauguration of the Reforms of 1919, criminal justice would be completely separated from executive hands. But all the attempts during the last ten years in this direction have been abortive. Nothing substantial has come out of the Resolutions passed by the Legislative Councils and the Committees appointed by the Provincial Governments during this period. The Government in every province have shelved the question on one pretext or another. They think that the reform is not in the least an urgent one. It has been the object of this Monograph to analyse the problem in all its details and to bring out clearly how dangerous to individual liberty is the combination of the judicial and executive powers in the same hands. The control of the executive is immediate and direct over the Magistracy. The Executive Officer of every district exercises a close control over all the officers wielding Magisterial authority in that area. Higher up the ladder also, the judicial officers are no more independent. The control of the Government over the Sessions Courts is not of course so open and brazen-faced, but it is there all the same. When the officers dispensing justice are thus completely under the influence and control of the Executive Government, what are the chances of the people to maintain and enjoy their privileges against the encroachment of that very Government? The judge is expected to be the task-master of the executive, but when that judge is himself dependent upon the favours of the executive, how can he discharge his functions satisfactorily at all? Naturally as against the Government, the people have now very little opportunity of getting any justice.

Papers and documents on the subject have accumulated into a large mass. They would now make a library. But although the raw materials are thus plenty, only one attempt has so far been made to cook them into a scientific treatise. I am referring to Mr. R. N. Gilchrist's "The Separation of Executive and Judicial Functions", published by the Calcutta University. My approach of the problem is fundamentally different from his. While some common grounds have been covered and many common materials have been inevitably threshed out, I have attacked the subject from a different angle and exploited many new sources of information.

I utilise this opportunity to thank Mr. Sachchidananda Sinha of Patna who very kindly lent me from the Library he has founded in that City a copy of the Report of Sir B. K. Mallik Committee on the Separation of Judicial and Executive Functions in Bihar and Orissa and Mr. C. Y. Chintamoni of Allahabad who sent me a very prompt reply to some of the queries I put to him. My thanks are also due to Mr. S. C. Coomer of the Imperial Library for his zealous help in making available to me the different papers and documents on the subject, and to my colleague, Mr. B. B. Bannerjee, M.A., B.L. who read a considerable portion of the Manuscript and made many valuable suggestions.

N. C. ROY.

CITY COLLEGE,
6th January, 1931.

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INTRODUCTION.

The judge occupies a pre-eminent position in the modern state. He is the guardian of the rights and privileges of the people against the encroachment of private persons and the aggression of executive officers. His function consists in interpreting the laws of the country and applying them to individual cases. He has got to settle not only private disputes but to bring under review executive action. The way he discharges his duty is of vital importance to the people. The legislature may lay down good and wholesome laws. But they would not be of any avail if they are not ably, promptly and impartially applied. Without right administration of justice, good government is out of the question. "There is," says Lord Bryce, "no better test of the excellence of a government than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen."[1]

Now if judicial administration has to be run properly and efficiently, some qualities are indispensable in the judges. Legal knowledge and skill are of course their essential attributes. In interpreting and applying the lew, they must have a thorough grounding in the legal principles and practices. But this intellectual equipment is not enough for the right discharge of their duties. They must be at the same time adorned with the moral virtue of impartiality which has in fact to be the breath of their judicial life. Without looking to the interest of any one, without consulting personal profit or party gain, without grinding national or communal axe, the judge has got to decide a case on its own merits. He is no respecter of persons. Neither the smile nor the frown of any authority, however high, may influence his verdict. To exercise such impartiality is certainly no easy job. It is indeed a tough business to overcome all internal and external influences and deliver the judgment only with an

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[1] Modern Democracies, Vol. II., p. 421.

eye to the law of the country and the facts of the case. As regards the internal influences—the personal prejudices and ideals—they must be left to the judge to be repressed by him as best he can. By no rules and regulations, they can be checked. But as regards the external influences and control, the judge should be made independent of them by every necessary precaution. Especially, he should be made immune from all control which the executive is so prone to exercise over him. This independence is the prime virtue that must always pervade a court of law. Without it, all other virtues which a judge may possess come to nothing. Of what use will be his legal learning, his wide experience and all his insight into human nature if he has not the independence to put them into operation? On the contrary if he is under the thumb of the executive, these qualities of his will be requisitioned for curbing popular liberty, and trampling upon individual rights and not for maintaining them against executive onslaughts. Independence of all external control is hence the basic quality of the judicial bench. This fact was brought out into relief in England in the seventeenth century. In the course of the fight between the Stuarts and the Parliament, it was early brought home to the people that the dependence of the judges upon the Crown for their office and emoluments was a great handicap to the popular cause. It was equally a revelation to the King that his control over the judiciary was a potent instrument in his favour. Sedulously, therefore, he attempted to make the judges absolutely subservient to him, and after the dismissal of Sir Edward Coke in 1616, he was quite successful in his venture. After this, all the resources of the English judiciary were marshalled against the rights of the people. The judges became the bulwark of royal prerogative. Nor could they act otherwise. Dependent upon the Crown for their future advancement, they could not be expected to give their verdict impartially in cases in which the Crown was interested. They could not commit economic and official suicide by delivering a judgment adversely affecting the prerogatives of the King. It was urgent and indispensable therefore that the judges should be independent of both the

Crown and the Parliament for their office and emoluments. If they were to apply the law of the land without consulting the interests of the executive, they must cease to hold office during the pleasure of the Crown. Their tenure of office must be during good behaviour. Accordingly it was embodied in the Act of Settlement that the judges must no longer be removed from the bench by the Crown. If they were guilty of any misbehaviour, they might be dismissed by the Crown only on an address of the two Houses of the Parliament. The judges thus passed out of the the control of the executive and the legislature. When the French publicist, Montesquieu, visited England in the middle of the eighteenth century and set about studying the social and political institutions of the country, this independence of the judiciary appealed to him much. He was so much fascinated by it that he easily formed the idea that the combination of different public functions in the same hands was the source of tyranny in his own country while their separation was the cause of popular liberty in England. He was really so much taken up with this aspect of British administration that he built out of it a political theory. The three branches of government, the executive, the legislature, and the judiciary, must be separated and clearly distinguished from one another. They must constitute three departments completely independent of one another. Their combination any way would be fatal to the liberty of the citizen. This doctrine of the Separation of Powers held long the imagination of the people of Europe and America. It seemed to have enshrined all political wisdom. It "came to be regarded as almost a political maxim which should lie at the basis of the political organisation of all civilised states."[2] In the constitutional practices of the present-day world, however, there has been a wide departure from this principle, enunciated by Montesquieu and once held sacred in every country. So far as the relations between the executive and the legislature are

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[2] F. J. Goodnow—Comparative Administrative Law (Students' Edition) Vol. I, p. 20.

concerned, the doctrine has certainly been completely thrown overboard in the leading states of Europe. They have taken to the parliamentary form of government in which the executive and the legislature are not only not separate but the executive is really a committee of the legislature.

But, however modified the principle of the Separation of Powers may have been in actual constitutional operation, the fact remains that the judiciary should be, in all respects, immune from any external control. In this aspect of the problem the assertion of Montesquieu still enshrines the vital truth. Neither the executive nor the legislature should be given any opportunity to interfere with the independence of the judge. The executive is to regulate its action and shape its policy only according to the law of the land. It must not overstep the bounds of law and take to a measure which its lawful authority does not cover. Whether the executive is acting within the law or not is for the judiciary to determine. The court must, therefore, have the right to scrutinise every executive act. The judge is, in other words, the task-master of the executive. After a careful scrutiny, he has either to uphold its action or to nullify it as illegal. Now the judge can give an impartial verdict in cases like these if only he is not any way under the influence and control of the executive. But to make the judiciary "in any sense subordinate to the executive is to make impossible the performance of the most urgent function within its province."[3] The combination of judicial and executive powers is clearly inadmissible for in that case the judicial decision may only cloak the executive tyranny. The judicial power may then be used to subserve executive expediency.

Now if we are to take away the judges altogether out of the influence of the executive and the legislature, the logical system would be to vest their election in the sovereign people. Neither the legislature nor the executive should have anything to do with their appointment. But however logical this

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3 Laski—A Grammar of Politics, p. 298.

principle of popular election may appear to be, in practical operation it has been proved to be inapt and inappropriate. During the revolutionary days of France, this experiment was made for some time but under the third Republic it has not been repeated. Many of the American States, imbued with extreme democratic tendencies, have accepted no doubt this principle of popular election for the judges. But under this system of recruitment, it cannot be said that proper persons have been raised to the bench. In fact a "growing dissatisfaction with the popular election of judges" is noticeable in many states to-day.[4] On the other hand the appointment of the judges by the executive to which so much objection was once taken has proved to be on the whole satisfactory. In the United States of America, all the Federal Judges are appointed by the Executive with, of course, the approval of the Senate.[5] And it is admitted on all hands that the Federal Judges thus recruited are by far the most efficient, impartial and independent in all America. In Great Britain also, the Judges are appointed by the executive. The judges of the Supreme Court are appointed by letters patent under the great seal on the advice of the Lord Chancellor, while the judges of the County Courts are appointed finally by the Lord Chancellor himself.[6] Although appointed by the executive, the judges of England have never been known in these days to have subordinated their judgment to the will of the executive. They have rather enjoyed an international reputation for independence and impartiality. This is because, once appointed, the judges have had no reason to curry favour with the executive. Their secure and permanent tenure of office has made them independent of all external control.

The question of the tenure of office is then the key to the independence of the judicial bench. Of the three branches

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4 Holcombe—State Government in U. S., p. 419.

5 Art. II, sec. 2 of the Constitution.

6 Anson—The Law and Custom of the Constitution, Vol. II, part II, (3rd Ed.) pp. 268, 270.

of government, the judiciary is naturally the weakest. The executive dispenses the honours and holds the sword of the community. The legislature commands the purse and prescribes the rules by which the duties and rights of the citizens are regulated. The judiciary, however, has no influence over either the sword or the purse. It is therefore in constant danger of being influenced and overpowered by the other two branches of Government. Now to counteract this influence and to follow a straight path of its own, it requires permanency in office which contributes the most to its firmness and independence. "That inflexible and uniform adherence to the rights of the constitution and of individuals which we perceive to be indispensable in the courts of justice can certainly not be expected from judges who hold their offices by temporary commission. Periodical appointments, however regulated, or by whomsoever made would, in some way or other, be fatal to their necessary independence."[7] Hence "on the whole it seems best that judges in all grades should ordinarily hold office during good behaviour."[8] They must not hold office during the pleasure of the executive or the legislature. That would make the judiciary simply subservient to either of the two branches of Government—an undesirable contingency. Once appointed, they should hold office for life. Nor should they look to the executive for their promotion in office and emoluments. "Promotion by the executive from a lower grade to a higher may be as dangerous to independence as the power of dismissal, since it would be practically much easier for the executive to reward judicial subserviency by promotion than to punish its opposite by dismissal."[9] Whichever body would determine the future promotion of the judges would control, to a great extent, their will and conscience. It is hence not a bad principle observed generally in many countries to-day that there must be no promotion in the judiciary. If, however,

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7 The Federalist No. 78.

8 Sidgwick—Elements of Politics, p. 464.

9 Ibid p. 465.

the principle of promotion has to be maintained, it must be either automatic or regulated by a body which may not have any interest in the work of the judges.

In the U. S. A. all the Federal Judges hold office during good behaviour and are removable only by impeachment.[10] The judges are as a rule appointed to a fixed post on a fixed salary. They labour under no fear of a transfer from one post to another for a decision not to the liking of the executive. Nor do they expect any favour at its hands for any action after its mind. Neither hope of promotion, nor fear of degradation affects their independence. In Britain also the judges enjoy a fixed salary and expect no promotion. The judges of the Superior Courts here, like the Federal Judges of the U. S. A. hold their office during good behaviour, and can be removed only by the King on an address of both Houses of Parliament. The inferior judges, however, can be removed from the bench at the instance of the Lord Chancellor.[11] They hold their office only during the pleasure of the Crown. The inferior judges in England do not thus in theory enjoy the protection given to the federal judges of the District and Circuit Courts of America. In practice, of course, the difference is not so much as noticeable. The English county judges are never dismissed except for gross misbehaviour. In France also both by law and usage, security of judicial tenure has been well established. But the system of promotion by the executive which has been put down as dangerous to judicial independence constitutes the very basis of the French judicial organisation. This promotion of the judges from a lower to a higher grade in France, of course, does not depend wholly upon the freaks of the executive. The minister of justice determines it, only with the help of an expert commission. But it cannot be said that extraneous influence and back-stairs pressure have no bearing upon it. In fact, other factors than seniority and merit very often decide the future of a judge. This is certainly not a congenial atmos-

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10 Article III, section 1 of the Constitution.

11 Anson—Op. Cit. Vol. II, part II, p. 268.

phere for the growth of judicial independence and impartiality. The judges in fact, instead of being the fearless task-master of the executive, want to stand well with the people who hold in the hollow of their hands their official destiny.[12] The efficacy of the principle that the promotion of the judges should not be determined any way by the executive is not thus affected by French experience.

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12 Bryce—Modern Democracies, Vol. I, pp. 305-6.

CHAPTER II.

EVOLUTION OF THE SYSTEM.

In the 18th century, the administrative system had absolutely broken down in India. "Lack of governance" was the pre-eminent feature of the time. The collapse of the mighty Mughal Empire had let loose all the forces of separatism and sectionalism in the country and heralded the Great Anarchy with all its horrid results. The East India Company that was gradually stepping into the shoes of the Great Mughals could not, for some time, grasp the full significance of its position. In Bengal, it remained for many years in power without responsibility. A British officer in India who has traced the rise of the Company's power in this country, has been constrained to observe that these years of misrule constitute "the only period of Anglo-Indian history which throws grave and unpardonable discredit upon the English name."[1] At last the situation became so grave that not only the Company's Directors themselves had to be prepared to face administrative responsibility but His Majesty's Government also began to interfere in Indian affairs and "regulate" Indian administration. But it was not possible to transplant overnight a cut and dried governmental system to the Indian shores. The Britishers were new to this country and unfamiliar with its social traditions, cultural background and economic system. Without a thorough and systematic exploration of administrative and economic facts it was not possible for the Company to impose a ready-made administrative structure upon India. All that the East India Company could do during the first half-century of its rule was to make administrative experiments. Most of its governmental measures were naturally tentative in character. No step could be taken all at once on a permanent basis. The crying need of the hour was strong government. The resur-

[1] Sir Alfred Lyall—British Dominion in India (1905), p. 143.

rection of law and order was the prime duty of the administration. In this matter the Company's government occupied the same position in India which Henry VII, the first Tudor, occupied in England after the Wars of the Roses. The forces of disorder that were abroad had to be checked and subdued and an administrative structure was to be reared that would guard against the anarchical traditions of the last half century. For the discharge of this duty of the hour, a corps of strong and efficient officers was indispensable and it stands to the credit of Lord Cornwallis that he was able to roll back the tide of corruption among the Company's officers and instil into them a new spirit and a new ideal. He was successful in creating a Civil Service for administering the Company's affairs and putting it on a sound and solid basis. His appointment in 1786 as the Governor-General of the British territories in India is hence a land-mark in the administrative history of the country.

Now in those rough and troublous days, if the Government were to establish its prestige and majesty, its officers must act with promptitude and vigour. Concentration of energy and effort was essential for the rapid discharge of duty. Niceties of modern administration were out of place in that age of turmoil. The doctrine of the separation of powers which was coming into vogue at the time in Europe and America, could not fit in with the Indian situation. Concentration of powers and the unity of authority were the principles advocated and accepted.[2] Shortly after the advent of Lord Cornwallis we find (1786) that the same officers in the districts had to discharge the duties of a revenue Collector, Judge and Magistrate. He had to assess and collect the revenue, try the civil and revenue causes, and was responsible for maintaining the law and order of the locality under his charge. He had also to try petty criminal cases and punish thereby the offenders he had himself taken into custody. This combination of functions was recommended by the Court of Directors in con-

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2 Joseph Chailley—Administrative Problems of British India, pp. 442-3.

sideration of its having a "tendency to simplicity, energy, justice, and economy,"[3] Now the arrangement that the same officer who was to assess the revenue was also to hear the complaints against this assessment was certainly not an equitable one. It was not expected to make for justice and fairplay. The officer who in his executive capacity had done injustice to any land-holder was not expected to be straight and generous enough in his judicial capacity to rectify the wrong. Naturally this iniquitous combination of functions roused the qualms of conscience of Lord Cornwallis and in 1793 it was laid down by the Governor-General in Council "that if the Regulations for assessing and collecting the public revenue are infringed, the revenue officers themselves must be the aggressors, and that individuals who have been wronged by them in one capacity can never hope to obtain redress from them in another."[4] The Collectors, therefore, should not themselves try the revenue cases any longer. Accordingly, the judge-magistrate of the district was relieved of his duty of collecting the revenue which becamee a distinct function by itself and was vested in a separate convenanted officer.[5] While, however, revenue and judicial functions were thus separated, the incongruous combination of police duties and criminal justice in the same hands was continued still. No protest against this unnatural combination was made; rather for a period at least the connection between the executive police and criminal justice was made more intimate and regular. The burden of duties thrown upon the judge-magistrate of the district was too heavy for any single officer to bear. His time was almost eaten up by his judicial duties. Hence executive work suffered; the police became inefficient in consequence and law and order ill maintained. At last in 1829, some changes were introduced in the administrative arrangement. Some new officers were created in the persons of the

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[3] The Fifth Report (Firminger's Ed. 1917), Vol. I, p. 22.

[4] The Preamble to Regulation II of 1793.

[5] Section III of Regulation II of 1793.

Commissioners of circuit and revenue.[6] Each of them was to be in charge of four or five districts, and in addition to the supervision of revenue work which was vested in them they were to go out in circuit as sessions judges. The supreme control over the police was also made over to these officers, so that in the hands of the Commissioners all the threads of administration were collected together. Excepting civil justice, all the functions of administration were centralised in their offices. Thus the combination of police duties and criminal justice which had been already noticed in the hands of the district officers, was now further developed and extended in the hands of the Commissioners. They became responsible at once for higher criminal justice and supreme police duties. The executive and judicial functions were thus fully combined in their hands. This administrative arrangement, like many other experiments during this period of British rule, was not to last long. It proved to be short-lived. In 1831, civil judicial and magisterial functions were separated. The former was vested in the civil judge of the district while the latter was made over to the Collector.[7] Henceforward the Collector became the chief executive officer of the district. He was to collect the revenue, control the police, and was in charge of criminal justice. As to the higher criminal justice, that was also to change hands. From 1831, the Government began to transfer it from the Commissioners to the Civil Judge.[8] This was a reform in the right direction. But while higher criminal justice was thus separated from executive duty, lower criminal justice remained combined with police functions. The District

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6 Regulation I of 1829.

7 Report on the Administration of Bengal (Statistical Summary), 1872-73, p. 49.

8 Section II of Regulation VII of 1831 made it competent to the Governor-General in Council to invest the District Judge with full powers to conduct the duties of the Sessions. And Act No. VII of 1835 further empowered the Governors of Bengal and Agra to transfer the whole of the duties of the Commissioners concerned with criminal justice to any Sessions Judge.

Collectors were to control the police, investigate crime, arrest persons on suspicion and at the same time try and punish them.

The combination of so many diverse functions in the hands of the District Officer did not, however, conduce to the efficiency of the administration. Lawlessness was rife and crime could not be properly repressed. For the better administration of the police, a rearrangement of public duties was now called for. Accordingly in 1836, Lord Auckland as the Governor of Bengal appointed a Committee to investigate into the actual state of police administration in the Bengal Presidency and make recommendations for the better organisation of the police force. The Committee after due enquiry reported that the hands of the District Officer were too full. It was not possible for one officer to do justice both to his revenue and police duties. Both the functions were onerous and exacting. Now the District Officers generally paid most of their attention and devoted most of their time to their revenue duties. It was as a result of this alone that the police force could not be properly supervised and police administration accordingly deteriorated. This defect, the Committee opined, could be made good only by separating the revenue functions from the hands of the District Officers and placing them in the hands of separate Officers to be known as the Collectors.[9] The Government accepted this recommendation of the Committee and ordered the separation of revenue duties from the rest of the functions of the District Magistrate. This separation was, of course, not effected all at once throughout the Province of Bengal. But by the year 1845, the scheme was carried out in every part of the Presidency except in some three districts.[10] The District Magistrate thus remained endowed with both judicial and police duties while the revenue duties were taken out of his charge. This administrative arrangement was given only a short experiment when it came to be attacked by the Government of Bengal. The division

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[9] The Report, p. 4.

[10] Parliamentary Papers Vol. 59 of 1857, p. 295.

of labour which this arrangement involved did not improve the efficiency of the police to any appreciable extent. On the other hand, it was supposed to have weakened the administration of the province. "We have suffered a grievous loss of power," observed Sir Cecil Beadon, Secretary to the Government of Bengal, in a note, dated 3 Dec., 1853, "maintaining a separate class of Collectors, charged with special duties insufficient to occupy their time and yet inhibited from rendering assistance to the other great branch of executive government."[11] The Government of Bengal was thus convinced that the reform inaugurated in 1838 was unwise and unnecessary and addressed a letter to the Government of India in 1854 advocating the reunion of magisterial and revenue functions. The letter pointed out that "the separation of the two offices has been injurious to the character of the administration and the interests of the people." "The Governor, therefore," the letter proceeds, "begs leave to recommend to the Government of India that steps should be taken for re-uniting the offices."[12] The recommendation of the Bengal Government could not be all at once accepted by the Supreme Government. It became the subject of a keen controversy among the different members of the Governor-General's Council. After several years' of minute-writing, however, it was decided at last in 1859 to abolish the separate office of the Collector and hand over his functions to the District Magistrate. This reunion of offices brought the Government to the situation of 1838. The District Officer again became overburdened with work and it became impossible for him to cope with the demands of the police upon his time and attention. It was accordingly thought wise to appoint a Police Commission in the following year to devise measures for an efficient organisation and a strict supervision of the police force. On the basis of the recommendations of this Commission, an Act was passed in 1861 by the Government of India which provided for a new

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11 Ibid p. 295.
12 Ibid p. 289.

constitution of the district police. In every district, a Superintendent of Police was set up under this Act. In him was vested all the executive control over the police in this area. In this capacity, he came under the authority of the Inspector-General of Police. The appointment, suspension, reduction, and dismissal of the subordinate police staff were placed at the disposal of the Superintendent working under the final authority of the Inspector-General of Police and his Deputies.[13] Thus in maintaining order and discipline in the police force, the Superintendent was not to be dependent any way upon any Magistrate. In detecting and preventing crime also he was to work "under the general control and direction" only of the District Magistrate.[14] The other magistrates of the district would have no connection with the police, either in the matter of the discipline of the force or in the subject of preventing and detecting crime. Except for a half-hearted association with the District Magistrate, the police would be a department altogether separate from the magistracy. In the year 1861, when the Act was passed, many officials were of opinion that this measure was the funeral of the combination of judicial and police functions maintained hitherto in the same hands. An official writer in the Calcutta Review actually went out of his way to observe that "the separation of the police and judicial functions is the grand fundamental principle of the present police reform."[15] But although in 1861, the union of judicial with police duties was looked upon as decently buried, it was not really dead. Only a decade passed before it was carefully exhumed and brought back to life. In the early seventies, Sir George Campbell was appointed to the Lieutenant-Governorship of Bengal. He was a bureaucrat of the most reactionary type and had implicit confidence in the divine despotism of the Covenanted Civil Service. It was not relishing to him at all that an important department like the police

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13 Section VII of Act No. V of 1861.

14 Section VI of Act No. V of 1861.

15 The Calcutta Review, June 1861, (Vol. XXXVI, p. 210).

should be immune from the supervision and control of the District Magistrate. It was his ambition to make this officer "the general controlling authority over all departments in each district." The District Magistrate must be, in his opinion, "the real executive chief and administrator of the tract of country committed to him, and supreme over everything except the proceedings of the courts of justice." Accordingly, the object of the Police Act of 1861 was to a great extent nullified and the Lieutenant-Governor had the satisfaction that he had "now made very clear the entire subordination of the police to the Magistrate for all and every purpose."[16] The ball was thus set rolling and during the next thirty years in every province, the intention of the law was overlooked and the District Magistrate became practically the head of the department of police. When the Indian Police Commission, appointed by Lord Curzon in 1902, began its enquiry, it was surprised at the degree of interference by the District Magistrates "which the law did not contemplate and which had often been most prejudicial to the interests of the department."[17] The Act of 1861 had made the police to a considerable extent independent of the District Magistrate. The Superintendent of Police, the head of the district force, was not amenable to his control and supervision except in matters of the detection and prevention of crime. Only in this field, the Superintendent was to act "under his general control and direction." As regards the maintenance of discipline and appointment and dismissal of officers, the Superintendent was to act under the orders of his superiors in the Police department. He was not to be responsible to the District Magistrate in these matters. But the Indian Police Commission of 1902-3 found the situation altogether different. The District Superintendent of Police was no longer the head of his department. He was found characterised in the Police Manuals as an assistant of the District Magistrate for police duties "and as such bound to carry

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16 Report on the Administration of Bengal, 1871-72, pp. 66-67.

17 Report of the Indian Police Commission (1902-3), Cd. 2478, p. 79.

out his orders." His office was "virtually a branch of the District Magistrate's headquarters office." In matters of recruitment and punishment of police officers also, the District Magistrate had come to exercise a decided voice. These duties were vested in the officers of the department. They were, however, to be exercised under rules to be framed by the Local Government, and the Local Government everywhere framed rules in such a way as to place in the hands of the District Magistrate an enormous power of control. This way the appointment of Constables was made subject to the veto of the Distrct Magistrate and that of any officer above the rank of the Constable could not be made without his previous sanction. The same degree of authority was exercised by the District Magistrate in taking disciplinary action and awarding punishment. Every member of the force had an appeal to the District Magistrate and the Commissioner of the Division. Even a Constable could not be reduced by the Superintendent without an appeal to the District Magistrate. The Indian Police Commission thought all this as going too far, and recommended a relaxation of the control of the District Magistrate. Without affecting his responsibility for the criminal administration of the district and for the preservation of the public peace, the Commission wanted for the police department greater independence and autonomy. It wanted, in fact, to revive the arrrangement contemplated by the Police Act of 1861.[18] The Government of India in pursuance of these recommendations, modified to some extent the position of the District Magistrate vis-a-vis the police. He was asked not "to interfere in matters of departmental management and discipline except where the conduct and qualifications of a Police Officer affect the criminal administration of his district."[19] This latter clause made the reform only nominal. The District Magistrate still retained the right of directing an enquiry into any misconduct on the

[18] Ibid, pp. 79-80.

[19] Report of the Royal Commission upon Decentralisation in India (1908), Cd. 4360, p. 191.

part of Police Officers. He was also empowered to call upon the Superintendent to remove incompetent subordinates.[20] All these powers notwithstanding, an impression gained ground that the District Magistrate had been shorn of his controlling authority over the police department. Accordingly the Royal Commission upon Decentralisation in India took evidence upon this question and recommended in its Report (1908) a closer and more intimate connection between the District Magistrate and the police department.[21] It also recommended that "the District Magistrate should be competent in the interests of his district to require the transfer of an inspector or a sub-inspector from any one part of it to another."[22] It was further of opinion that the police stations and their records should be regularly inspected by the District and Subdivisional Magistrates in the course of their tours.[23] These recommendations were accepted by the Government and embodied in the police manuals.

We have thus travelled far since 1861 when Act V of that year was passed. The head of the magistracy in the district was by this measure given only so much of directing and controlling authority over the police as was indispensable for discharging his duties for preventing and detecting crime. Of the Magistrates in the district, he alone was allowed to have a link with the police. Even his connection with it was understood to be provisional. It was given out, as we shall see later, that in the near future even the District Magistrate would be shorn of his responsibility for maintaining law and order and as such would cease to have any connection with the police. During the next half century, not only this last link between the magistracy and the police was not snapped, it was tightened to a far greater extent. The connection of the District Magistrate with the Police has been made more intimate and his control over this department more stringent. He is now in his district the head, in the true sense of the term, of the revenue, the magisterial and the police departments. He is the

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20 Ibid, p. 191.

21 Ibid, p. 192.

22 Ibid, p. 192.

23 Ibid, p. 192.

head of the department that detects crime and hunts out the alleged criminals. He also heads the department that dispenses justice to these suspected offenders. Again he is not the only Magistrate now in the district who is associated with the police. During the last quarter of the nineteenth century, the sub-divisional system was carved out and the officers in charge of these administrative areas have all along exercised all the police powers of the District Magistrate within their limited jurisdictions. For a period of time, the District Magistrate himself continued to be the officer in charge of the Sudder Sub-division. But on the recommendations of the Decentralisation Commission of 1908, he has been relieved of this charge and some other Magistrates have now to be placed at the head of even the Sudder Sub-divisions. In every district, therefore, besides the District Magistrate there are other officers who are concerned both with judicial and police duties. It is not in the District Magistrate alone that executive and judicial functions now meet. They have now been combined in the hands of some other magistrates also, sometimes two, and sometimes even as many as five or six in a district.

CHAPTER III.

History of the Movement for Separation.

The movement for the repeal of the incongruous combination of executive and judicial functions in the same hands first began under official auspices. The anomalous character of this union of powers was apparent to British officers in the early days of the Company's Government in this country. Lord Cornwallis, we have seen, did not allow the revenue Collectors themselves to try the revenue cases. He had no confidence in the system under which a man who was responsible for making an assessment of revenue would be asked to judge if any person was being adversely affected by that assessment. He thought the Zemindars of the country would have no justice under this arrangement. Equally incongruous was certainly the system under which the same man was allowed to catch a thief and try him in the court of law. Lord Cornwallis possibly did not consider the circumstances of the country quite favourable for modifying this arrangement. Those were desperate days and called for desperate remedies. The abnormal condition of the country was the only justification for the arrangement that would leave an individual at the capricious mercy of the executive officers. Nearly half a century later, when Lord Auckland appointed in 1836 the Committee to investigate into the condition of law and order in the Presidency of Bengal, the situation had changed considerably since the days of Cornwallis. The people of the older provinces had now been accustomed to stable government for a considerably long period of time. Anarchical forces had been exorcised and law and order to a great extent established. These changed circumstances demanded a change in the administrative system. The 'patriarchal'' form of justice might have suited the Indian conditions during early British rule, when strong government was the only necessity of the

day. It was, however, quite out of tune with the political atmosphere of the older provinces of India in the thirties of the last century. The union of criminal justice with police functions might have been warranted in unsettled times, but its continuance in normal peaceful days was only an unhealthy anomaly. It was time that judicial and executive powers which had been concentrated in single hands should now be completely separated. The people of the country had, however, not yet learnt to voice forth their grievances in public. Public opinion had not yet been organised. It was not till the year 1851 that the first political organisation, the British Indian Association, was started at Calcutta. It might therefore be expected that the grievances from which the people were silently suffering would go unspotted and unrecognised. But fortunately this did not happen to be the case. There were officers of the Company who had still unquenched the fire of their idealism. Their sense of justice had not yet been thoroughly blunted. In the absence of an organised public opinion, they took up the cause of the suffering millions. We have seen that Lord Auckland's Police Committee which reported in 1838 was unanimously of opinion that for the better administration of the police the revenue functions should be taken out of the hands of the District Magistrate and placed in charge of a separate officer. While, however, this was the opinion of the Committee, Mr. Frederick Halliday, one of its members, touched upon a plague spot of Indian administration in a separate minute. "The union of Magistrate with Collector has been stigmatised as incompatible," he observed, "but the junction of thief-catcher with judge is surely more anomalous in theory and more mischievous in practice. So long as it lasts, the public confidence in our criminal tribunals must always be liable to injury, and the authority of justice itself must often be abused and misapplied. For this evil, which arises from a constant and unavoidable bias against all supposed offenders, the power of appeal is not a sufficient remedy; the danger to justice, under such circumstances, is not in a few cases but in every case. In all the magistrate is constable,

prosecutor and judge. If, the appeal be necessary to secure justice in any case, it must be so in all...... I consider it then an indispensable preliminary to the improvement of our system that the duties of preventing crime and of apprehending and prosecuting offenders, should without delay be separated from the judicial function."[1] This was a very strong and unhesitating opinion, expressed by an officer of the Company of fourteen years' standing. Nor did he stand alone in demanding this reform. Mr. Bird, the President of the Committee and Mr. Lowis, a fellow member associated themselves with him in this unambiguous condemnation of the union of excutive and judicial powers in the same hands.

The movement for the separation of the two functions, thus initiated by Frederick Halliday, gained in strength and momentum as years rolled on. In the fifties, it became a subject of keen controversy in the Council of the Governor-General in which some of the most distinguished members of the covenanted service took sides. In 1854, we have seen, Sir Cecil Beadon addressed, as Secretary to the Government of Bengal, a letter to the Government of India. The purpose of this letter was the repeal of the arrangement that had removed the revenue functions from the hands of the District Magistrate. In this letter was enunciated very clearly and deliberately what is known as the oriental theory of government. The letter wanted to bring it home to the Supreme Government that a Separation of Functions was against the genius and traditions of an Eastern people. "It seems to his Lordship", runs the letter, "that the true theory of Indian government is the entire subjection of every Civil Officer in a division to the Commissioner at the head of it and the entire subjection of every executive officer in a district to its executive chief. Even as regards judicial officers, his Lordship is inclined to think that a great advantage is gained by placing them in all matters of an executive nature directly under the

1 Appendix of the Report, p. xx.

Commissioner."[2] It was hence futile and even dangerous to depart from this principle of unity of authority and separate the functions according to their nature and character. This was a forceful document. It challenged the fundamental principles of public administration which had been accepted as indispensable for good government in the West. As the letter reached the Government of India, it became the subject of a most cogent and powerful attack by Sir John Peter Grant, a member of the Governor-General's Executive Council. In a minute, dated the 23rd November, 1854, he tried to demolish the very basis of the scheme submitted by the Government of Bengal. He pointed out that not only the existing separation of powers was desirable and useful but it should be carried further to the logical extent. Not only the revenue functions should remain separate from police duties but criminal justice also should be taken out of the hands of the District Officer. He took up the old arguments of Frederick Halliday expressed in 1838, and observed "according to my ideas it ought to be our fixed intention as soon as possible to dissever wholly the functions of Criminal Judge from those of thief-catcher and public prosecutor now combined in the office of Magistrate. That seems to me to be indispensable as a step towards any great improvement in our criminal jurisprudence, and any change of system to be made meanwhile should be contrived, I think, with regard to this fundamental reform."[3] He observed further, by way of a rejoinder to Beadon's oriental theory of government, "I am unable to support that part of the scheme which would place the judge under the revenue and police Commissioner. A great part of the business of a judge is to decide upon the cases civil and criminal in which the Commissioner is a most anxious and of course, often a prejudiced party. If a man is to be a judge at all, he should be independent. But the mere fact of his decisions not being appealable to the Commissioner will not make him independent

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2 Parliamentary Papers, Vol. 59 of 1857, p. 28

3 Ibid, p. 306.

if in all respects or in any other respect he is placed under the Commissioner's superintendence and control."[4] This was exactly the opinion of Frederick Halliday in 1838. But in course of a decade and a half, he had managed to go back upon his former view and by the time (1854) he became the first Lieutenant-Governor of Bengal he was a zealous convert to the oriental theory of government enunciated by Sir Cecil Beadon. As the note of Sir John Peter Grant was referred to him, he decided to resist with his own emphasis the contention that the Separation of Powers should be logically and whole-heartedly carried out. Although in 1838, he was an officer of fourteen years' standing and had ample opportunity of experiencing men and things for this long period, he now thought that his note of that year was only the result of his immature judgment. "In the days of my smaller experience," he observed in his minute of April 1856, "I myself have held and advocated the opinion which I now very heartily condemn. The opinion to which I allude is this,—that the magistrates of every degree should be debarred from all judicial powers, and should have nothing but executive duty of preventing and detecting offences, and that separate judicial functionaries should always receive and try cases of every kind committed to them by the magistrates of various degrees . . . It is a scheme foreign and unintelligible to Asiatic notions and altogether founded on European ideas and habits."[5] "Nothing," he continued further, "can be more opposed to the oriental plan of administration than the entire separation of judicial from executive duties, which is advocated by the over much occidentalists."[6] This attitude of Sir Frederick Halliday had the mild support of the Governor-General, Lord Canning who did not think it expedient to denude the executive officers from exercising judicial powers.[7] Sir John Peter Grant, of course, did not allow these observations of the Lieutenant-Governor of Bengal to go unchallenged. He returned to the

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[4] Ibid, p. 307.
[5] Ibid, p. 344.
[6] Ibid, p. 344.
[7] Ibid, p. 371.

attack in a second Minute, dated 9th April 1857. He did not question the contention that in some parts of the world the combination of various functions in the same officer might be expedient. But what he asked was whether Bengal was "a fit country for patriarchal experiment." "For this system," he pointed out, "two parties were required: the sage and paternal ruler of a district and the dutiful family of subjects. Not to speak of the first requisite, I may safely deny that Bengal affords the last." The people of this Presidency were in fact "past the patriarchal epoch." The one point of decision, he thought, was which way crime was more certainly discovered, proved and punished and innocence more certainly protected. He had no doubts on this question. The principle of the division of labour had all its general and special advantages in this matter. As regards the contention that the theory might be applicable to Europe but was ill-suited to India, he doubted if there was any real difference between the two countries in relation to this question. He went further still and observed that if there was any difference at all, "the difference is all in favour of relieving the judge in India from all connection with the detective-officer and prosecutor. The judicial ermine is in my judgment out of place in the by-ways of the detective police man in any country and those by-ways in India are usually dirty."[8] In this struggle for the separation of the judiciary from the executive, Sir John Peter Grant had throughout the powerful support of Sir Barnes Peacock, later the first Chief Justice of the High Court of Fort William. In the heat of controversy, of course, the majority of his colleagues was arrayed against him. But in cooler moments, the Government of India as a whole were to a very great extent convinced of the justice of the cause which Sir John Peter Grant had espoused. The question of the police organisation came in at this moment for solution. The matter was too important to be decided by the Hon'ble Members of Government writing contradictory minutes. It had to be referred to an expert Commission which was appointed in 1860.

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8 Ibid pp. 383-5.

In issuing instructions to this Indian Police Commission, the Government of India were found to be quite conscious of the anomaly of combining judicial and police powers in the same hands. They pointed out to the Commission that "the functions of a Police are either protective and repressive or detective, to prevent crime and disorder, or to find out criminals and disturbers of the peace. These functions are in no respect judicial. This rule requires a complete severance of the Police from the Judicial authorities, whether those of higher grade or the inferior magistracy in their judicial capacity."[9] The Police Commission which reported in the same year also noticed the anomaly of such a union of powers and recommended that as a rule the official who was to collect and trace out the links of evidence, and prosecute the offender should on no account sit in judgment on the case. While, however, this was the broad opinion of the members of the Commission, they could not muster sufficient courage to follow it up to its logical conclusion. They could not go the whole hog and recommend the complete separation of judicial from executive duties. While all other magistrates must be shorn of their connection with the Police, the District Magistrate must still remain vested wih supervisory and controlling authority over this institution.[10]

The Government of India accepted the recommendations of the Commission and promptly proceeded to give effect to them. When the measure based on these recommendations was on the legislative anvil, Sir Barnes Peacock regretted its halting character and observed that "a full and complete separation ought to be made between the two functions."[11] Sir Bartle Frere who was in charge of the Bill was himself quite conscious of the evil which the combination of these powers involved. He was confirmed in his belief that the union of police and judicial duties was so incongruous as to make either the police

9 The Separation of Judicial from Executive duties in British India (a compilation of documents and papers) Edited by P. C. Ray, (1903) pp. 27-28.

10 *Ibid*, pp. 31-32.

11 *Ibid*, p. 54.

officers inefficient or the magistrates biassed.[12] The two functions should never go together. He was not, however, ready to complete the separation immediately. He was going as far as he thought possible at the moment and hoped that "at no distant period the principle would be acted upon throughout India."[13] The holding out of this hope was taken quite seriously in the sixties of the last century. It was taken for granted that the old patriarchal system was doomed for ever. Its passing was only looked upon as a question of years, if not of months. The High Court of Fort William under the leadership of Sir Barnes Peacock urged the Government in its Annual Reports to fulfil the promise and complete the separation. The question of the proper training of the judges was also at this time seriously inviting the attention of the High Court and the Government, and the High Court did not think it feasible to provide for a systematic legal training of the District Judges without completely separating the executive from judicial duties.[14] Thus on its own merits, as also on extraneous grounds, the union of the two functions demanded repeal. In 1868, the Secretary of State in a despatch referred this question of giving suitable judicial training to the members of the Indian Civil Service, to the Government of India. The Government of India in their turn called upon the Provincial Governments and the district and divisional officers to put forward their opinions on the subject. Some of the covenanted officers in their memoranda pointed out in unambiguous language that the separation of judicial from executive functions was the indispensable pre-requisite to any administrative reform. F. R. Cockerell of the Bengal Civil Service submitted a scheme for the total separation of the two ill-matched duties. This separation was called for not only "in consideration of the defects resulting from the want of proper legal training." It was also warranted by the theoretical and practical objections to the combination

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12 *Ibid*, p. 34. 13 *Ibid*, p. 59.

14 Report upon the Administration of Criminal Justice in the Lower Provinces, 1869, pp. 12-13.

of the two functions in the same hands. "The Collector may as Magistrate try cases, the prosecution of which has been instituted by himself, and there are instances on record in which this power has been indiscreetly availed of. It is obviously a position which is calculated to suggest doubts in the minds of the people, in regard to the strict impartiality and independence of the judgment of the tribunal so constituted, nor is the case much improved in this point of view, when the Collector's prosecution is instituted before his subordinate, the Joint-Magistrate, who has to work in great measure to the approval of his immediate official superior for his own personal advancement."[15]

In view of the facts and opinions, delineated above, it could be expected that the desired reform would not be delayed much longer. Sir Bartle Frere had in 1860 promised it in the near future, the High Court of Fort William demanded it as an indispensable preliminary to the efficiency of criminal justice in the country, and on the top of it all some of the most experienced officers of the Crown now advocated it in the most unhesitating manner. The people naturally might now look forward to the early transference of judicial powers from executive hands. Truly, this reform would have been an accomplished fact in the early seventies of the last century but for the reactionary intervention of a member of the Viceroy's Council. This intervention made all the difference. It set back the hands of the clock of progress and sealed the fate of the reform that had been taken to be inevitable. Sir James Fitzjames Stephen was now the Law Member of the Governor-General's Executive Council. He had succeeded the distinguished jurist, Sir Henry Sumner Maine, to that office. When the question of the separation of powers and the allied problem of judicial training of the officers were demanding solution, he sat down to write an emphatic note on the administration of criminal justice in British India. The result was the celebrated Minute of 1871 which was published in the year following as No. 89

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15 The P. S. of the memorandum.

of the Selections from the Records of the Home Department of the Government of India. This Minute constitutes a landmark in the history of the struggle for the separation of judicial and executive functions in this country. Up till this time the subject had been discussed only with reference to its adaptability to Indian conditions. Those who had supported the reform had done it on the score of its being applicable to the situation out here. In the same way the officers who had opposed it, looked upon the separation as unsuited to the conditions of the country and the traditions of the people. Neither party to this controversy had invoked any extraneous ground for supporting or opposing this reform. Sir James Stephen, however, carried the controversy in his Minute to a different plane. He did not stop to consider if the reform would add to the efficiency and impartiality of justice in India. He looked upon all this as irrelevant and beside the point. What only mattered to him was whether the transference of criminal justice from executive hands would affect the permanence of British rule in this country. No step in his opinion should be taken for the improvement of justice which might adversely affect the future of British Dominion in India. "It seems to me," he observes, "that the first principle which must be borne in mind is, that the maintenance of the position of the District Officers is absolutely essential to the maintenance of British rule in India, and that any dimunition in their influence and authority over the Natives would be dearly purchased even by an improvement in the administration of justice."[16] But the authority and prestige of these officers would certainly suffer, he thought, if they were deprived of the exercise of criminal jurisdiction which "is both in theory and fact, the most distinctive and generally recognised mark of sovereign power. All the world over, the man who can punish is the ruler."[17] The position of the District Officer is the foundation of British rule in India. That position would suffer if the separation of powers was undertaken. The anomalous combination of judicial and execu-

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16 Minute, p. 29. 17 *Ibid*, p. 33.

tive powers must therefore continue whatever might be the fate of justice on that score. These emphatic observations of Sir James Stephen set forever the tone of the Civil Service in this country. Hitherto this governing service had been divided on this question. But the invoking of the name of British Dominion now silenced all opposition to the patriarchal system. Every voice in the Covenanted Civil Service in favour of the separation of functions was now hushed. And if perchance some noble spirit of this brotherhood of rulers would dare to protest against the prostitution of justice which the union of the two powers in the same hands clearly involved, he would be a marked man and would pass only as a dangerous idealist working towards the loss of British Dominion in India. The publication of the Minute of Sir James Stephen thus puts an end to an epoch in the long history of the demand for the separation of judicial from police functions It closes the period in which the officials had taken the initiative and lead for the repeal of this ill-matched combination of powers. During the next forty years almost every member of the Indian Civil Service would set his face against any reform in the direction of the separation of powers. Even to-day after about sixty years of the writing of the Minute, there are not many Britishers in the Civil Service who have a good word for this reform. So potent has been the reasoning of Sir James Stephen.

But although the British Officers withdrew their sympathy from the movement which had begun under their auspices, it was not allowed to die from want of support. Just by the time Sir James Stephen's argument hushed the voice of official opposition, public opposition to the anomalous combination of powers began its eventful course. Since the early fifties, the Indian public was slowly awaking from the long stupor and somnolence into which it had been hurled by the great anarchy of the eighteenth century. During the seventies, public opinion was already a force. The starting of the Indian Association in 1876 gave fresh momentum and strength to the popular agitation for administrative reforms. The combination of

executive and judicial duties in the hands of the British Indian Magistracy was one of the many ills of government which invited the attention and roused the opposition of the people. The gentleman who on this particular subject took the lead and educated Indian public opinion deserves special mention. He was no other than the late Mr. Manmohan Ghose of the English Bar of Calcutta. He was the first Indian to be called to the Bar by an English Inn. He joined the High Court of Fort William in the later sixties of the last century. Soon he built up for himself an extensive criminal practice which was by no means confined to Calcutta. In fact he got his briefs mostly from the Mufassil. This way he secured his first hand acquaintance with the methods of criminal administration in the Presidency. Associated as defence lawyer with most of the important criminal cases in the different parts of the province, he acquired an unrivalled knowledge of the vagaries of the Muffassil Magistrates. The evils of the union of judicial and executive powers were clearly brought home to him. From day to day he saw the danger to the liberty of the people which this union involved. He found that under this system the District Magistrates could subject any individual who somehow incurred his displeasure to oppression and tyranny. In 1883, when India was under the enlightened rulership of Lord Ripon, he submitted to that Governor-General a memorial on the criminal administration of the country. In this document, he advocated among other reforms, the immediate transference of criminal justice from the control of the District Officer. Nothing, however, came out of this memorial. It remained pigeon-holed in the Imperial Secretariat. Well-meaning as Lord Ripon was, he had not the driving force to repeal this unnatural combination, in the face of the opposition of the entire Civil Service. He had burnt his fingures rather badly in the Ilbert Bill controversy, and now silently dropped the idea of having another iron in the fire.

While, however, the subject was given only a cold shoulder by even the most enlightened Viceroy of the nineteenth century, the public made arrangements for carrying on the agitation

with all the greater vigour. In the year 1885, the Indian National Congress had its first sitting at Bombay. In its second session at Calcutta, in 1886, the Congress under the presidency of Dadabhoy Naoroji passed a resolution to the effect "that a complete separation of executive and judicial functions has become an urgent necessity and that, in its opinion, it behoves the Government to effect this separation without further delay, even though this should in some provinces, involve some extra expenditure."[18] The agitation thus set on foot was continued by the Congress with unabated vigour for over thirty years. Up to 1916, this great organisation was dominated by the Moderate School of Indian Politics, and during this long period there was not a session of the Congress which did not discuss this question threadbare. In every meeting of this All-India body, the combination of the two functions was condemned and a resolution for its repeal was unanimously passed. On several occasions, even the Presidential addresses found room for reference to and condemnation of, the union of judicial and police functions. The speech of the President of the National Congress possessed and even now possesses an importance all its own. It could not refer to all the subjects which would be reviewed by the Congress. It only touched upon the most outstanding problems to which the attention of the Congress and the public had to be specially invited. During the moderate regime, the Presidential address discussed, in fact, only those grievances from which the country was specially suffering. The late Sir Surendra Nath Bannerjea in his two Presidential addresses, in the Poona Session of 1895 and the Ahmedabad Session of 1902, devoted a good space to this question. Referring to the contention that the separation of powers could not be undertaken for that would diminish the prestige of the District Officer, he very cogently observed that "Prestige which perpetuates injustice and excites discontent and dissatisfaction among the masses is not worth having. It is no aid to the

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18 The Indian National Congress (G. A. Natesan & Co.) Second Ed. Part II, p. 7.

Government. It is a source of weakness and embarrassment."[19] In 1902 he was equally emphatic in his demand for the reform. "If it is true," he said, "justice is the bulwark of Thrones and States, then there can be no more urgent or pressing consideration than a proposal which seeks to improve the administration of justice in India and to relieve it of the scandals which are inseparable from the present system."[20] The Bombay Session of the Congress in 1904 was presided over by Sir Henry Cotton who had retired from the Indian Civil Service two years earlier. This gentleman, while in Service, was a marked man for his sympathy with the Indians in their national aspirations. He could not be a member of the Viceroy's Council, or the Lieutenant-Governor of a province simply because he could not fall in with the ideals of Lord Curzon. In his Presidential address, he made out a case for the immediate withdrawal of the old patriarchal form of justice. The remedy for all the ills associated with justice in this country lies, he declared, "in the complete separation of the judicial from the executive service."[21] In the following year at Benares, Mr. Gokhale also referred, from the Presidential Chair, to this question as one of the reforms which should not be delayed any longer. Year in and year out such demands went forth from the Congress platform, but the Government turned only a deaf ear to them all. It was this indifference of the Government to the Congress resolutions, which helped the transference of this great organisation from moderate to extremist hands in 1917. A change of Congress policy was at once undertaken. The extremists had lost all faith in passing empty resolutions for administrative reforms which they themselves could not carry out and which only elicited silent scorn from the Government. They therefore concentrated all their attention upon the wider question of Indian Home Rule. Once that was won, all the administrative ills could be remedied without further agitation. The question of the separation of judicial from executive functions thus took

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19 *Ibid*, Part I, p. 271. 20 *Ibid*, p. 691. 21 *Ibid*, p. 780.

its exit from the Congress platform, after engrossing its attention for over thirty years.

While the Indian National Congress was making a vigorous though ineffective demand for the repeal of the combination, this question was also being fought on other platforms and through other agencies. In 1888, was published in England "A few plain truths about India," by the Right Hon'ble Sir Richard Garth. It was a small brochure and had no pretensions to much literary merit. It was, what its title signified, a very plain, blunt and unvarnished expression of some opinions on the administrative system in India. But emanating from the source they did, these opinions carried great weight. Sir Richard had been, some time earlier, the Chief Justice of Bengal and in this capacity he had much experience of the relations between the executive and the judiciary in this country. His opinion on the position of the judiciary, therefore, could not but confirm and strengthen public feeling against the union of the two incompatible duties. "When the functions of a police man, a magistrate and a judge are all united in the same officer," he affirmed, "it is vain to look for justice to the accused." "To be tried by a man who is at once the judge and prosecutor," he continues, "is too glaring an injustice, and it is only wonderful that a system so indefensible should have been allowed to prevail thus long under an English Government."[22] This trenchant condemnation of the system by one who had the right to express an opinion on this matter whetted public indignation all the more in this country, but it failed to make any impression on the unimaginative mind of the Government.

Several years later occurred an incident which compelled the Secretary of State for India to break his silence and express his opinion on this administrative question. In 1892, the famous Mymensingh case focussed public attention. It was aptly illustrative of the evils of uniting criminal justice with

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22 A few plain truths about India (W. Thacker & Co., London, 1888), pp. 43, 45.

executive authority. Not that it was an isolated instance of the evil. It was only one of the many thousands of such cases occurring in the country from day to day.[23] But the special feature of the Mymensingh case was that the victim was a highly influential noble man and a great public benefactor. When Raja Surja Kanta Acharya Bahadur could be disgraced, persecuted and made to suffer an immense loss simply for the fact that a District Officer of perverted ideas bore a malice against him and took it into his head to humiliate him in public, nobody in the Presidency could think his honour safe and his individual liberty secure. The whole of Indian society was hence convulsed as the story of the Raja's humiliation got abroad. The incident was widely condemned in the press and on the platform. The Lieutenant-Governor was moved to take proper steps against the District Magistrate. But he only disapproved in a mild resolution of the methods and procedure of the action of the District Officer. Beyond this he refused to do anything.[24] The matter was, however, not allowed to rest there. Lord Stanley of Alderley who had interested himself in Indian questions dragged it to the House of Lords. A discussion was introduced on the 8th May 1893, and Lord Stanley pointed out quite convincingly that under the existing arrangement "justice could not be administered satisfactorily." Lord Kimberley, the Liberal Secretary of State, participating in the debate made an important pronouncement. He admitted that it was "contrary to right and good principle that the civil and judicial powers should be united in one person." He assured the House that he was "in no way insensible to the inconveniences which arise from the union of these two func-

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23 "This case is only one of many hundred instances of the injustice of the system which have come under my own knowledge; and one of many thousands of such cases of which the people, and specially the natives, are every day complaining." Sir Richard Garth in a letter on this case to M. Ghose. See the *Amrita Bazar Patrika* for 7th January, 1893.

24 Proceedings of the Bengal Legislative Council, Vol. V, (1893) p. 203.

tions." That the existing system was faulty was "not a matter in dispute." But, he thought, the separation of the two functions would necessitate the doubling of the staff and the state of Indian finances would make it impossible to carry that out. Viscount Cross who had been the Secretary of State for India in the preceding Conservative Cabinet, associated himself with the opinions of Lord Kimberley. The question under review was such an important one that he himself, while in office, was anxious to deal with it. But the financial condition of the Government stood in the way.[25] The debate in the House of Lords thus gave the impression to the public that the only objection of the Government to the separation of judicial from police functions was a financial one. And if this objection could be met, the British Government in India would in no time annul the fusion of the two powers. Mr. R. C. Dutt of the Indian Civil Service was at this time on leave in England. He was an officer with an experience of over twenty years of active service to his credit. He had held charge of some of the biggest districts in Bengal. He was convinced that the separation of the two functions would not entail any material addition to the public expenditure. The debate in the House of Lords and the pronouncement of the Secretary of State now encouraged him to work out his scheme and put it before the public. After about three months of labour, he completed his scheme and published it in the August issue of 'India' in 1893. The scheme was introduced by Sir Richard Garth who in his note again bewailed the continuance of executive control over criminal justice and commended the scheme of Mr. Dutt to the Government and the public. By way of justifying the public demand for separation, Mr. Dutt alluded to the evils of the existing arrangement which he himself had experienced. "I have for years past," he observed, "directed and watched police enquiries in important cases, had the prisoners in those cases tried by my subordinates, heard and disposed of the appeals of some of those very prisoners and superintended their

[25] Hansard's Indian Debates, (Session 1893), pp. 282—290.

labours in prisons. And during all these years I have held the opinion that a separation of Judicial and Executive functions would make our duties less embarrassing and more consistent with our ideas of judicial fairness, that it would improve both judicial and executive work ; and it would require no material addition to the cost of the administration."[26] The Secretary of State for India had observed in the House of Lords that the separation of the two functions would necessitate the doubling of the official staff and that this was his only objection to the immediate repeal of the existing system. Now an officer of the Crown was pointing out to him with all the experience and responsibility of his position that the financial objection had been unduly exaggerated. And what is more, he was now ready with a cut and dried scheme for the separation of functions which would not put any appreciable strain on the public purse. Was it not up to the Secretary of State, committed as he was in his speech to the principle of separation, to seize this opportunity and order a detailed examination of the scheme of Mr. Dutt? If he was serious about his opinions, expressed on a responsible occasion on a responsible platform, he should have welcomed this scheme and investigated carefully and promptly if as it was or modified here and there it could be applied without much addition to public expenditure. But the Secretary of State far from examining it would not even look at it. The question of expenditure, as later history would show, was only a camouflage for postponing the issue to an indefinite time. His speech in the House of Lords was only the formal expression of a sensible opinion which he had no intention to carry out in practice in India. In the Bengal Legislative Council, Sir (then Mr.) Surendra Nath Bannerjea asked if the Government had seen the scheme of Mr. Dutt and if they wanted to take any action upon it. The Chief Secretary replied that the attention of the Government was drawn to the scheme by the Secretary of the Indian Association but "the

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[26] Para IV.

Lieutenant-Governor was not in a position at present to make any statement regarding it."

Even in the face of this indifference of the Government, the Indians continued the agitation. In December 1895, was published in 'India' an interview with Mr. Manmohan Ghose. He pointed out in this interview that the danger from the union of the two functions was not only not on the wane, it was actually on the increase. There was a greater tendency now in Bengal, he said, "to force the Judiciary to decide criminal cases according to the pre-conceived ideas of the Executive."[28] This interview in which he exposed the different methods of executive interference with criminal justice was expected to acquaint the British public with the actual position of the judiciary in India. Mr. Ghose also conceived at this time of an influentially attested memorial to the Secretary of State for the repeal of the union of police and judicial powers. It was with a view to this that he compiled and published two pamphlets in the middle of the following year. One was a collection of the opinions of highly placed officials and judges in India in favour of the separation of the two functions. In the other were collected twenty cases illustrative of the evil which had sprung from the fusion of the two powers.[29] These cases were not meant to be exhaustive. They were only typical instances of official high-handedness nourished by the unholy co-operation between executive and judicial powers. The particular purpose for which the two compilations were made and published was not immediately fulfilled. The projected Memorial did not at once materialise. But the pamphlets did their work. They evoked a rejoinder from the pen of Sir Charles Elliot who had only recently retired from the Lieutenant-Governorship of Bengal. As the Satrap of this Presidency, he was noted for his autocratic ideals. He was the man who moved heaven and earth for the withdrawal of the jury system

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28 See P. C. Ray—*Op. Cit.* p. 166.

29 The two pamphlets have been incorporated in P. C. Ray's Compilation.

from this province. He believed in the divine right of the Indian Civil Service to govern this country and never allowed his imagination to be warped by any ideal of liberty and freedom. Such a man now entered the list to cross swords with Mr. Manmohan Ghose. He wrote a long article on the subject which was published in the Asiatic Quarterly Review for October 1896. It was a long eulogium of the existing patriarchal system. In his support of the combination of the two powers, he revived the old oriental theory of government formulated by Sir Cecil Beadon and sanctified by Sir James Stephen. "I would point out," he observed, "that the keynote to our success in Indian Administration has been the adoption of the oriental view that all power should be collected into the hands of a single official so that the people of the District should be able to look up to one man in whom the various branches of authority are centred and who is the visible representative of Government."[30] The District Magistrate was the eye and ear of Government. His hands should on no account be weakened. He must continue to hold in his hands all the threads of the different branches of the Administration. He must also have the officials in all these branches under his general control. All these were the old arguments of Sir James Stephen. After the debate in the House of Lords in 1893, it was supposed that this trend of reasoning had become out of date. But Sir Charles Elliott would still swear by them. He had still confidence in their potency. He even out-distanced his *Guru* in his zeal for the *status quo*. He did not think the supervision and control of the District Officer over the Magistracy of the district as merely expedient, he made himself almost ludicrous by saying that it was useful and beneficial as well. He even went to the length of questioning the fact that the duties of the police and the criminal judge were any way dissimilar. "There is no real distinction in kind," he observed, "between the action taken before and after the trial."[31]

This article, so naked in its praise of the existing despotism,

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[30] Para 11. [31] Para V.

would certainly have elicited a crushing reply from Mr. Manmohan Ghose. Unfortunately, however, in the course of the month he died. It was now left to others to fulfil the task which would have devolved upon him had he survived. In "India" for November 1896, were published two replies from eminent authorities to the article of Sir Charles Elliott. Sir John Budd Phear who had been a Puisne Judge of the Calcutta High Court and the Chief Justice of Ceylon gave an effective rejoinder to his theory that the duties of the police and the judiciary were essentially of the same nature and type. "On this principle it seems plainly to follow," observed Sir John, "that the metropolitan magistrates are an expensive and unnecessary luxury and in the interests of economy and justice they ought to be got rid of, and Scotland Yard to be entrusted with the disposal of the work."[32] Mr. H. J. Reynolds who had been a member of the Indian Civil Service, had considerable experience of the District administration of Bengal and had risen to be the Chief Secretary to the Government of this province also gave a cogent and suitable reply to Sir Charles Elliott. "That a system which is vicious in principle will naturally bear evil fruit," he remarked, "is a reasonable conclusion. It is for Sir Charles Elliott to show that this is one of those exceptional cases in which it is possible to gather grapes from thorns and figs from thistles."[33]

The memorial which Mr. Manmohan Ghose had proposed was delayed by his sudden death in 1896. It was not till July 1899 that the memorial was presented to the Secretary of State, Lord George Hamilton. It went over the signature of Lord Hobhouse who had succeeded Sir James Stephen to Law membership of the Government of India and several other men with long and practical experience of Indian administration. The noble array of signatories included the names of two ex-chief Justices of Bengal, a retired Chief Justice of Ceylon, several retired Puisne Judges of the Calcutta High Court and several retired executive officers of the Government. The memorial

[32] Para X. [33] Para VII.

itself was divided into three sections and had two appendices attached to it. The first section was devoted to a brief history of the problem, the second was taken up by the arguments which the memorialists adumbrated for the separation of the two functions. In the third was embodied the scheme of separation which Mr. R. C. Dutt had published in 1893 and which was now accepted by the Memorialists. In the first appendix were collected fourteen letters and articles bearing on the question and in the second appendix were placed the two pamphlets of the late Mr. Manmohan Ghose. It was an imposing document signed by an imposing array of public men, and it was expected to have the desired weight with the Secretary of State and the Government of India. Of course the Memorial has not been without its traducers. Some people have tried to cry down its importance on grounds quite unconvincing. It has been pointed out that most of the memorialists were men with judicial experience and only two were there who had borne administrative responsibility.[34] How can this be a ground of complaint it passes one's understanding. Men who had sat on the bench of the highest tribunal, men who had headed the judiciary in a province were certainly the fittest persons to speak on the position of the law courts in their relation to the executive. They had seen from within how the combination of the two functions stood in the way of the judges discharging their duties with independence and fairness. They had experienced from day to day not simply the open control which the executive exercised over the criminal courts but also the many sinister and overt methods by which the executive Government tried to keep the judiciary under its malign influence. Men who had sat on the High Court bench and as such had a direct experience of the relations between the executive and the judiciary were hence the most qualified to recommend to the Secretary of State the changes necessary in the existing system. The executive officers on the other hand

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[34] R. N. Gilchrist—The Separation of Executive and Judicial Functions, (1923), p. 119.

were not expected to give quite the impartial opinions on the subject. They were apt to be prejudiced in favour of the arrangement under which they had worked so smoothly and comfortably. Used to greater authority and wider powers, they were not expected to recommend the curtailment of their jurisdiction. Accustomed to maintain law and order with a free hand, they would generally refuse to recommend a system under which all their acts would be open to the scrutiny of the courts entirely independent of them. They had so long controlled the destiny of the subordinate magistracy. They looked upon these Magistrates as their henchmen ever ready to subserve their interests. Would they all at once invite a reform that would make these very Magistrates their task-masters? Very few would like to accept such a self-denying ordinanace.

The second ground on which the importance of the Memorial has been belittled is its association with Mr. Manmohan Ghose's pamphlet containing the twenty cases. It has been observed that a system under which only twenty instances of the miscarriage of justice could be brought out was indeed an eminently successful and useful one. This was the comment made by Sir Charles Elliott soon after the publication of the pamphlet in 1896. This point was, however, quite successfully met by Mr. Reynolds one month later in his article in "India." He pointed out that these cases were not and could not be an exhaustive list. They were "only types and specimens of hundreds more in which similar injustice has been done, but there has been no publicity and no redress."[35] Besides, these twenty cases were chosen by Mr. Ghose as he had personal knowledge of the details as they happened. In every one of these cases he was retained as the defence lawyer and in this capacity he came across at first hand the vagaries of the Magistrates. The Memorialists wanted to draw up a case for the separation of criminal justice from executive authority. They tried to bring it home to the Secretary of State that the existing system was a danger to individual liberty and provided

35 Para XI.

ample scope for executive high-handedness. By way of illustrating this contention, they thought it wise to append some specimen cases to the Memorial. It was from this motive that the pamphlet of Mr. Ghose was incorporated in the Memorial as an appendix. We do not see how it has weakened the case of Lord Hobhouse and his co-signatories. It has on the contrary strengthened it. But ignoring the reply of Mr. Reynolds in 1896, and the obvious character of the pamphlet, some critics[36] would still repeat that this collection instead of being a condemnation of the existing system constituted its vindication.

The Memorial pointed out that the duties of the judge and the executive officer differed considerably in nature and character. They were not infrequently contradictory. "While a judicial officer", it observed, "ought to be thoroughly impartial and approach the consideration of any case without previous knowledge of the facts, an executive officer does not adequately discharge his duties unless his ears are open to all reports and information which he can in any degree employ for the benefit of his District."[37] The union of the two functions was hence quite incompatible, and even if serious miscarriages of justice did not always occur, its administration was sure to be brought "into suspicion while judicial powers remain in the hands of the detective and the public prosecutor."[38] So long as the District Officer would try a case of which he had taken cognizance or have it tried by a subordinate within his control "the administration of justice in India," the Memorial repeated, "is not likely to command complete confidence and respect."[39]

Within three months of the submission of this Memorial, a judgment was delivered by a Sessions Judge in Bengal which authoritatively and emphatically brought to the fore the serious nature of the evil which the combination of the two functions involved. This judgment was delivered on the 7th of October

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36 Gilchrist—*Op. Cit.*, pp. 116-7.

37 Para XII. 38 Para XI. 39 Para XIII.

1899 by Mr. Pennel, the District and Sessions Judge of Chupra, then a district in Bengal, in the case *Queen-Empress* v. *Constable Narsing Singh*. The case itself was not an extraordinary one. It was of the type of cases that happened frequently. But the correct and impartial attitude taken up by the Sessions Judge was certainly an extraordinary one. It was uncommon for a judicial officer belonging to the Indian Civil Service to call spade a spade, and protect an innocent, helpless individual from the high-handedness of the executive and that too with an apposite censure upon the illegal methods of the executive officers concerned. The judgment took the country by storm and shook the Indian Civil Service and for the matter of that the whole of Anglo-India to its base. It showed the timeliness of the Memorial and certainly added weight to its contention for the immediate annulment of the union of the two incompatible powers.

But what was the fate of this Memorial? After about one year of its submission, Mr. H. Lewis put a question on this subject to the Secretary of State in the House of Commons. Lord George Hamilton said in reply that the Memorial had been forwarded to the Government of India in August 1899 and he had not yet received any report from that Government. Asked further as to when he did expect it, the Secretary of State answered that the subject concerned was a large and important one and he could not say when the Government of India would be able to report.[40] Two years more passed by and in March 1902, Mr. Caine questioned the Secretary of State if he had received any reply from the Government of India. Lord George Hamilton again answered in the negative but assured the House that the Government of India had this question under their consideration and were consulting the Provincial Governments on the subject.[41] In 1903, in the budget debates of the Indian Legislative Council, Rai Sri Ram Bahadur incidentally referred to this question and urged that

[40] Hansard's Indian Debates (Session 1900), p. 284.
[41] *Ibid*, (Session 1902), p. 160.

the separation of the police from the magistracy should be undertaken without delay.[42] But there was no response from the Government bench. The Government of India were of course still considering the question. In 1905, was made the much delayed publication of the Report of the Indian Police Commission which had been appointed in 1902 and presided over by Sir Andrew Fraser, later the Lieutenant-Governor of Bengal. The Majority of the Commissioners who belonged either to the Indian Civil Service or to the Indian Police Service, had still full confidence in the union of executive and judicial powers in the hands of the District Magistrate. They considered that "in the interests of the people the police must remain under the general control and direction of the District Magistrate. He is the officer in every way marked out for the discharge of the duties of supervising both the Magistracy and the Police."[43] The District Officer must hence continue to be "the connecting link between the executive and judicial functions of the administration."[44] While this was the not unexpected opinion of the Commission, the Maharaja of Darbhanga, the only Indian Member of this body, advocated the separation of the two functions in his Note of Dissent. "Having regard to the actual working of the present system," he wrote, "it is hard to see how approval can be accorded to an arrangement under which the District Officer is at one and the same time the head of the police and the head of the magistracy."[45] Cases had frequently occurred, he affirmed, "which show that this combination of the duties of the police and the Magistrate leads to failure of justice and what is still more regrettable, makes the entire administration less popular than it should be."[46]

While thus the demand for the separation of the two powers was thickening from far and near, the Government of India were sleeping over the Memorial of 1899. They had already

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42 Proceedings, Vol. XLII (1903), p. 113.

43 Report of the Indian Police Commission of 1902, (Cd. 2478) p. 81.

44 *Ibid*, p. 82. 45 *Ibid*, p. 153. 46 *Ibid*, p. 153.

received the opinions of the Provincial Governments which had been of course most unfavourable to the separation of powers. The Bengal Government, for example, had reported in 1901 that "in the interests of good government *i.e.*, of general administrative expediency, the union of executive and judicial functions in district and sub-divisional officers was at the present day essential."[47] In the provinces the Indian Civil Service was, in the fullest sense of the term, the Government. The Lieutenant-Governor who was the head of the establishment was himself a senior member of the Service. The Secretaries and the District and Divisional Officers who supplied him with information and advice belonged also to the same corps. In view of these facts, the unfavourable character of the opinion of the Provincial Governments should have been taken for granted even before it was actually submitted. The demand for the separation of the executive and judicial powers was regarded by the members of the Indian Civil Service as a reflection upon their activities. They thought that the Indian public had rather perversely taken it into its head that the Civilians were misusing their power. It was to check this alleged misuse that this demand for the separation was being put forward. The Civilians, therefore, set their face in a body against this reform for otherwise they would be admitting their human weakness. They could not be convinced that abuses under this system were inevitable. There would be no injustice to any body under this arrangement only when ideal men with extraordinary rectitude were placed at the head of the Indian Districts. But the Indian Civilians, however efficient in their own way, should not have any idle pretension as to that uncommon uprightness. They were after all ordinary mortals with the prejudices and foibles of ordinary men. But the members of the "Heaven-born" Service were not ready to admit it. This explains their universal opposition to any scheme of administrative reform.

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47 Quoted by Sir Henry Wheeler in his speech in the Bengal Legislative Council on the 5th April 1921. See Bengal Legislative Council Proceedings, Vol. I, No. 6, p. 269.

This attitude of the Indian Civil Service was not unknown to the Government of India and the Secretary of State. Hence if they were serious at all about the separation of the two functions, they should have taken to some other straightforward method for gathering opinions and information. They might have appointed an impartial Committee of Enquiry whose recommendations would have been a better guide to the Secretary of State in this matter. But this was not to be. The Government of India and His Majesty's Government in England thought it still wise to be guided by the Indian Civilians, however prejudiced a party they might be on this question.

At the time of discussing the financial statement in 1907, this topic was again raised by some non-official members in the Indian Legislative Council. Dr. Rashbehary Ghose looked upon the union of judicial and executive functions in the same public servant as "certainly an anachronism at the present day in the advanced provinces." But he observed in a tone of disappointment that there were some fallacies "which, though doomed to death, are yet fated not to die," He had thought that the Government of India would take prompt action upon the Memorial of 1899 sponsored by so many distinguished men. "But nothing has yet been done. The question, we are told, is still under consideration."[48] The Maharaja of Darbhanga also spoke in the same vein. "Law Courts," he thought, "have a peculiar importance in this country. They are regarded as the one check on the executive." The judiciary should hence be immediately emancipated from the control of the executive. He was not sure if any scheme of separation was likely to prove expensive. "But even if it was, the reform is of a character which would justify any expenditure that might be bestowed on it."[49] Sir Harvey Adamson, the Home Member of the Government of India, also participated in the debate. He tried to belittle the anomaly and danger of the existing

[48] Proceedings of the Legislative Council of India, Vol. XLV., pp. 71-72.

[49] Ibid, p. 120.

system. But he could not go the whole hog in support of the existing arrangement. He had to admit that it was not "in all respects a satisfactory one." He held out the hope that in course of the year "the question will be brought to a solution." But he hinted at the same time that "it will be necesasry to address Local Governments again,"[50] on this subject. Seven months later on the first of November 1907, Mr. Gokhale asked the Home Member as to how far the question of separating executive and judicial functions had advanced. Sir Harvey Adamson said in reply that "a definite scheme for the experimental separation of Judicial and Executive functions in a few selected districts of certain provinces is now under the consideration of the Government of India and it is probable that the Local Governments concerned will be consulted on the subject shortly."[51] In March, 1908, Sir Harvey Adamson speaking on the Financial Statement acquainted the members of the Indian Legislative Council with his provisional scheme. He admitted that "criminal trials, affecting the general peace of the district, are not always conducted in the atmosphere of cool impartiality which should pervade a Court of justice." Unless the administration of justice was above suspicion in India "it can never be the bed-rock of our rule." Steps should hence be taken which would remove public suspicion in the impartiality of criminal tribunals in this country. The Government of India, announced the Home Member, had accordingly "decided to advance cautiously and tentatively towards the separation of Judicial and Executive functions in those parts of India where the local conditions render that change possible and appropriate." He further pointed out that a commencement of the separation should be made in Bengal including Eastern Bengal. It was from Bengal that the cry for separation had gone forth and it was appropriate that the experiment should be first made in that province.[52] This statement of Sir Harvey Adamson raised much hope in the Indian nationalist circle that the much fought for reform was at last attaining

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50 Ibid, p. 181. 51 Ibid, Vol. XLVI, p. 35. 52 Ibid, pp. 248-249.

fruition. But this was only a delusion. In the budget debate of the previous year, the Home Member had hinted that the subject would require further reference to the Provincial Governments. In replying to the question of Mr. Gokhale in November 1907, he had repeated that the Local Governments concerned would be consulted on the subject shortly. Accordingly the scheme which he had expounded in the Indian Legislature was referred in 1908 to the two Governments of Bengal. And this reference amounted to the practical burial of the scheme. It was a foregone conclusion that the Indian Civil Service headed by Sir Andrew Fraser and Sir Lancelot Hare would see nothing in the scheme that would be useful to public administration in Bengal. Sir Andrew Fraser, as the President of the Indian Police Commission of 1902-3, had recommended that the union of criminal justice with police power should stand as usual. Five years later as the Lieutenant-Governor of Bengal he was not expected to change his opinion. Nor would his comrades advise him differently. He frankly recommended to the Government of India that the whole scheme should be dropped.[53] Sir Lancelot Hare, the Lieutenant-Governor of Eastern Bengal also set his face against the proposal of separation. What would the Government of India now do? They now simply marked time. In 1909, Sir Andrew retired from the *Gadi* of Bengal and was succeeded to that office by Sir Edward Baker. This gentleman, while associated with the Government of India, had a considerable hand in the formulation of the scheme of Sir Harvey Adamson. He was convinced of the utility of separating criminal justice from executive control. It was, therefore, expected by the Indian public that in his regime the scheme would be given a trial in Bengal. But he could not overcome the opposition of the rest of the Indian Civil Service to the scheme of separation. He had, therefore, to postpone the issue. He reported to the Government of India that the time was unpropitious for the reform in question.[54]

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[53] The Bengal Legislative Council Proceedings, Vol. I, No. 6, p. 269.
[54] Ibid, p. 270.

On the 29th March 1910, Mr. Dadabhoy raised this issue again in the Legislative Council of India, while discussing the Financial Statement. He could not understand "why there should be so much delay over the settlement of the details of a small measure."[55] He did not know that not merely the details but also the principle of the reform had been attacked by the Civil Service in the two Bengals. He had no idea that once the underlying principles of a measure had been accepted by the Government, they might be questioned by the Civil Service and the whole thing might be gone into afresh. Soon he was disillusioned. Mr. Madge, an official member of the Indian Legislative Council, voiced the opinion of the Civil Service when he condemned the very principle of separating the two functions. He pointed out that it would diminish the prestige of the District Officer which was so very essential for the peace and safety of the District.[56] This was the orthodox argument of the Civilians against the proposal of separation. In 1908, Sir Harvey Adamson had ridiculed this prestige theory.[57] Now, however, he succumbed to the opposition of the officers like Mr. Madge. In reply to Mr. Dadabhoy he pointed out that the scheme was being held over for the time being and that for three reasons. In the first place the two Bengal Governments had reported that the scheme would cost much more than the original estimate of the Government of India. The Government, however, were not at that time in a position to find the money that would be required by the new experiment. Secondly influential sections of opinion in two Bengals thought that the scheme would weaken the power of the District Officer. Neither the Government of India nor the head of the Bengal Government, Sir Edward Baker, shared this opinion. But still he thought it would be unwise for the Government to launch upon a reform in the face of the opposition of those "whose views are entitled to consideration." Thirdly political

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55 Proceedings of the Council of the Governor-General of India, Vol. XLVIII, p. 628.

56 Ibid, p. 734

57 Ibid, Vol. XLVI, p. 249.

crime was at this time rife in Bengal and "in these conditions it is undesirable to make delicate experiments with the judicial system."[58] The scheme was thus postponed, rather given a smooth and unostentatious burial. It was the opposition of the Indian Civil Service which killed it. No doubt, after 1910, there was some parley over this issue between the different governmental authorities. But all this came to nothing. All beat retreat before the solid phalanx of opposition which the Indian Civil Service presented. On the 10th September 1912, the late Mr. Bhupendra Nath Basu asked the Home Member if any decision had been arrived at as to the question of the separation of the two functions. Sir Reginal Craddock replied in the time-honoured fashion that the Government of India were not in a position to make any statement on the subject.[59] The Indian nationalists still, however, did not give up the fight. Nor had they lost all hope yet. On the 17th March 1913, during the discussion on the financial statement, Sir Surendra Nath Bannerjee moved a resolution in the Indian Legislative Council, to the effect that some money should be set apart in the budget for the experiment of the scheme of Separation in certain selected Districts. But even this moderate proposal could not have the support of the Government. Sir Reginal Craddock pointed out that the Government of India could not accept the proposal at the time. He made a rather surprising observation that the discussion on the Adamson scheme between the different Governments "is still going on. It is not yet finished." Mr. Vijiaraghavachariar could not resist the temptation of asking as to what was still under consideration. He questioned whether it was the principle of the reform or the principle having been accepted it was the details that were being discussed. Sir Reginald Craddock, however, would not say anything definitely. Even when urged by the President to answer either way, he would not commit himself. He only said that the principle and the details could not be differentiated. All the non-official votes were cast in favour

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58 Ibid, Vol. XLVIII, p. 757. 59 Ibid, Vol. LI, p. 6.

of the resolution but the standing official majority was opposed against it. The resolution was lost.[60] A year later the Great War broke out and the issue was postponed *sine die*. Submitted in 1899, the Memorial was accorded a tortuous discussion for about a decade. But nothing substantial came out of it except the empty scheme of Sir Harvey Adamson which in its turn was discussed for a full quinquennium and then abandoned without regret. Strange are the ways of the bureaucracy.

Meanwhile the Royal Commission on the Public Services in India was appointed in 1912. It was presided over by Lord Islington and among its members were Lord Ronaldshay (now Lord Zetland), Mr. Ramsay MacDonald, Mr. Gokhale and Sir Abdur Rahim. This Commission took some valuable evidence on the question of the Separation of the Judicial from Executive powers. Indian gentlemen both non-official and official who appeared before this body as witnesses were practically unanimous in their demand for the withdrawal of executive control from over criminal justice. Dewan Bahadur P. Rajagopala Chariar, a statutory Civilian on the Executive side, at that time the Dewan of Travancore, deposed before the Commission that the first need in his opinion was "the complete separation of the Revenue (Executive) and Judicial Departments."[61] Sir C. Sankaran Nayar, then a Puisne Judge of the Madras High Court condemned the arrangement under which the officer interested in the administration of the police, was also responsible for trying cases or having them tried by his subordinates. This system, he pointed out, had fully alienated the confidence of the public in the impartiality of the criminal tribunals.[62] Mr. S. Kasturi Ranga Aiyangar, the reputed publicist of the southern Presidency, voiced the demand of the people when he observed that he was "in favour of a complete separation of judicial and executive functions in the holder of

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60 Ibid, pp. 383-394.

61 Report of the Royal Commission on the Public Services in India, Vol. II (Cd. 7293), p. 262.

62 Ibid, p. 463.

an office. Purity of the administration of justice and the confidence of the people in the same demand the adoption of this measure."[63] In Bengal both Mr. K. C. De and Mr. J. N. Gupta, two Indian members of the Civil Service and distinguished District Officers, did not see any objection to the separation of the two functions.[64] The non-official witnesses raised a chorus of opposition to the existing arrangement. Mr. Bhupendra Nath Basu in his evidence demanded that not only the District Officer should himself be divested of all judicial duties but he should not be given any control over the officers dispensing criminal justice.[65] From other provinces also came the same cry. Pandit Madan Mohan Malaviya tried to bring it home to the Commission that the separation of the two powers was the unanimous demand of all classes of the Indian people. It was time that the reform should be conceded.[66] When the Commissioners collected all this evidence, it was expected that they would record an opinion either way on the subject. But at the last moment, the Commission was convinced that the question was outside its terms of reference and accordingly it refrained from making any recommendation.[67] Sir Abdur Rahim did not agree to this contention. He did not think that the subject was without the purview of the Commission. He accordingly devoted a portion of his excellent minute of dissent[68] to this topic and concluded that "there should be a complete separation of the judicial and executive functions." "This already exists in the Presidency towns," he added, "and the arrangements which obtain there could easily be adjusted to the district conditions."[69]

In 1919 the Reforms were introduced and soon the provincial and central legislatures were reconstituted under the new Government of India Act. Elective element now got the

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63 Ibid, p. 255.
64 Ibid, Vol. III, (Cd. 7578), p. 464.
65 Ibid, p. 481.
66 Ibid, Vol. IX, (Cd. 7581), p. 79.
67 Ibid, Vol. I, (Cd. 8382), p. 196.
68 Mr. Gokhale died before the completion of the Report.
69 The Report, Vol. I, (Cd. 8382), p. 452.

upper hand both in the provincial councils and in the two Houses of the Central Legislature. The question of judicial and executive separation was hence assured a favourable reception in all these bodies. But this did not bring the question any nearer the solution. The Executive not responsible to these Legislatures, but dominated as hitherto by the Indian Civil Service, took good care not to carry out the reform. The question was evaded every time it was raised. Early in 1921 the Hon. Mr. Bhurgri moved a resolution in the Council of State requesting the Government of India to take immediate steps for the severance of the two functions. Sir William Vincent, the Home Member, tried to whittle down the necessity and urgency of the reform. But, he pointed out, it was not for the Government of India now to discuss the question. Justice was a provincial subject under the new regime and it should be tackled by the Provincial Governments as best they could. If any of these Governments thought it wise to separate the two functions and take criminal justice out of executive control the Government of India would not stand in the way. On this assurance being given, the resolution was withdrawn by leave of the House.[70]

It was now the turn of the Provincial Legislative Councils to move for the reform. On the 4th of April 1921, a resolution recommending "the total separation of the judicial from the executive functions in the administration of this Presidency," was introduced in the Bengal Council by Mr. K. M. Choudhury. He hoped that under the new regime the angle of vision of the officials had changed and that no time would be lost "in giving effect to this much-needed reform."[71] Participating in the debate on this resolution, Sir Henry Wheeler, the Member in charge of the Political Department, made a "halting, hesitating, and ambiguous speech."[72] He

70 The Council of State Debates, Vol. I of 1921, pp. 435-449.

71 Bengal Legislative Council Proceedings, Vol. I, No. 6, pp. 255-259.

72 This was how this speech was characterised by Kumar Shib Shekhareswar Ray in the Bengal Legislative Council in March, 1923. Proceedings, Vol XI, No. 5, p. 27.

traced the history of this question since the year 1836 and then in a most non-commital way summarised the arguments on either side of the controversy. The theory that Magisterial authority should not be subject to executive interference and control was admitted no doubt by the Government. But Sir Henry remained silent as to whether the Government would practically undertake to separate the two functions at an early date. He proposed that the whole subject should be examined afresh by a competent Committee. He wanted an authoritative pronouncement by some experienced experts as to how the separation could be carried out. The non-official Indian members looked upon this proposal of the Home Member as a method of shelving the issue. They would not of course object to such a proposal and would amend the resolution accordingly if the Government definitely accepted the principle that criminal justice should be immediately and completely separated from executive functions. They would have no objection to such a Committee if it were only to work out the details of a scheme of separation which had been already accepted in principle. On no assurance being given by the Government on these points, the resolution of Mr. Choudhury was put to the vote and carried without a division.[73]

The Government of Bengal, inspite of this resolution, still adhered to the view that as a preliminary step a Committee should be formed to elaborate a practical working scheme for the separation of executive and judicial functions in the administration of this province and to report on the cost thereof. Accordingly on the 19th August 1921, the Governor in Council appointed a Committee on the lines foreshadowed by Sir Henry Wheeler in the Council debate of the previous April. It was to be presided over by Sir Ewart Greaves, a justice of the High Court of Fort William. Of the other five members, Mr. F. C. French was a senior member of the executive branch of the Indian Civil Service, Sir Ashutosh Chowdhury was a retired justice of the High Court and a member of the Legislative

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[73] Bengal Legislative Council Proceedings, Vol. I, No. 6, pp. 268-290.

Council, Dr. A. Suhrawardy, an educationist and a prominent representative of the Mahomedan Community in the Legislative Council, Raja Manmotha Nath Rai Chowdhury of Santosh was also a member of the Legislative Council with over twenty years of valuable experience in Indian public life, and lastly Mr. G. Morgan was representative of the European interest in the Bengal Legislative Council. It was thus a Committee of experienced men which Sir Henry Wheeler had wanted to set up and the conclusions of this body might be regarded as "an authoritative pronouncement" which he had so much looked forward to. The Committee examined twenty-one witnesses of whom fourteen were executive officers, one being the Commissioner of a Division, and nine District Magistrates. The other witnesses were lawyers, some of them practising in the Mufassil. The Committee also sent a questionnaire to all District Magistrates who were not orally examined and their replies were available to the Committee. Similarly another questionnaire was sent round to the District Judges and their replies were of much help to the Committee. The views of the different public bodies on the subject were invited and received and they helped the Committee materially in coming to its conclusions.[74] The Committee was thus acquainted with every shade of opinion upon the subject. All the pros and cons were before the members of this body and they now after digesting all these evidences came to the conclusion that there was "no practical difficulty in effecting a separation of judicial and executive functions."[75] They actually drew up a scheme which would provide for a complete separation of the two powers, which would at the same time disturb the existing conditions as little as possible and which would also minimise any increase of administrative cost.[76]

The Committee finished its work and submitted its Report in January 1922. But it was not published immediately. The Government sat tight upon it for about a year. It was not

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[74] Report of the Greaves Committee, p. 5.

[75] *Ibid*, p. 6. [76] *Ibid*, p. 6.

till the close of November that the Report was placed before the public. Even then the Government revealed no intention of giving effect to the recommendations of the Committee. The personnel of this body was chosen by the Government and in all the individual members of this Committee the Government had the fullest confidence. After exploiting all the most authoritative sources of information, the Committee came to certain conclusions as to the methods of separating the two functions and as to the extra cost that they would involve. If a Committee asked the Government to depart from an established line of public policy or to initiate any new principle of public administration, it could be open to the Government to reject the recommendations. But if a new principle of public administration is once accepted by the Government and if an expert Committee is set up to work out the details for carrying out that principle, it is certainly not open to the Government to reject the work of this Committee very lightly. Time may prove that the Committee is not far-seeing in every detail and not accurate in every estimate. No human work can be all-perfect. Every scheme must have a flaw. But still these recommendations of the expert committee, come to after much deliberation and weighing of all evidences, must be the best upon which the Government may act. They must undoubtedly be far weightier and more authoritative than any opinion of an individual officer of the Government. But the Government of Bengal and for the matter of that all the bureaucratic authorities in India, cherish peculiar opinions in these matters. On the 15th of March 1923, Kumar Shib Shekhareswar Ray brought a resolution in the Bengal Legislative Council asking the Government to give immediate effect to the recommendations of the Greaves Committee. He was disappointed that the Government had not taken any notice of the Report although it had been before them for over a year. The question of separating the two functions was kept hanging so long that the Governmet should burke it no longer. It was time that they should prove their sincerity in the matter by acting up to the recommendations of the Committee which

they themselves had appointed. Sir Hugh Stephenson, successor of Sir Henry Wheeler in the Political Department, spoke on the resolution in reply to the Kumar and his supporters. His speech was a most disappointing performance. Its temporizing character was apparent. The object of Sir Hugh was only to postpone the issue. He, of course, announced that the Government had accepted the principle of separation. But he could not see yet how it could be carried out. He found fault with the Report of the Greaves Committee in this particular and that. He would like to reject this recommendation and was not sure as to the utility of the other. He also thought that the Committee had underestimated the expenditure necessary for the reform. Now how could he think that way? Why, his officers in the Muffassil had told him so.[77] So he had more confidence in the judgment of himself and some of his officers than in that of the expert Committee. The Indian members of the Council were not surprised that the Report of the Greaves Committee had thus practically been consigned to the Waste Paper Basket. They knew quite well that this was the only fate which the recommendations of the Committee would attain. The setting up of the Committee was a mere eye-wash. It was a cover for doing nothing. The attitude of the Government was quite apparent. But still the resolution of the Kumar was put to the vote and agreed to without a division.[78] Several months later on the 17th August 1923, Maulavi Hafizar Rahaman Choudhury asked Sir Hugh Stephenson as to what action the Government were taking upon the Greaves Report. Sir Hugh replied that the matter was under the consideration of the Government and he was not in a position yet to make any statement on the subject.[79] A few more months passed by and the Government remained still silent over the matter. Then on the 14th March 1924, Mr. Debi Prasad Khaitan moved a resolution recommending the early separation of judicial and executive functions in Bengal. Sir Hugh Stephenson in speak-

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77 Bengal Legislative Council Proceedings, Vol. XI, No. 5, pp. 27-58.
78 *Ibid*, p. 58. 79 *Ibid*, Vol. XIII, p. 233.

ing on this resolution announced that he had considered the scheme of the Greaves Committee as unsatisfactory in many important particulars and hence worked out a scheme of his own which provided for a complete separation of the two functions. But this scheme involved some radical alteration of the functions and prospects of the services in Bengal. Without the consent of the Secretary of State, it could not on that account be given effect to. Accordingly in November 1923, the scheme had been sent to the Government of India so that through them it might be despatched to the Secretary of State for his views. In the mean time, Sir Hugh confided, an officer had been placed on special duty "to work out in detail the cost of the scheme," and his task was now practically finished.[80] So the Member in charge of the Political Department could himself draw up the scheme and a special officer could make a correct estimate of the expenditure that would be necessary for the reform. Sir Hugh thus gave out the impression that the expert Committee of 1921 was an unnecessary luxury. All that it had tried to do so unsuccessfully and so inefficiently could be accomplished satisfactorily and accurately in the course of three months by a Member of the Government in collaboration with an officer on special duty. But in point of fact, if the labours of the Greaves Committee had proved to be unproductive, those of Sir Hugh Stephenson were no less so. His scheme was sent to the Secretary of State for his seal of approval, and there in the labyrinths of the India Office it lost its way. More than three years after its despatch to the Secretary of State, a question was put in March 1927, to the Government as to the fate of this pet scheme of Sir Hugh Stephenson. Mr. A. N. Moberley, the successor of Sir Hugh, replied to Mr. Akhil Chandra Dutt that the Secretary of State had not yet favoured the Government of Bengal with his opinions and views on the scheme.[81] The India Council was either sleeping over the document or had ordered it to be consigned to some pigeon-hole

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80 *Ibid*, Vol. XIV, No. 4, pp. 130-135.

81 *Ibid*, Vol. XXV, No. 3, pp. 236-237.

to remain forgotten there for ever. Nothing more has been heard of it. Thus the ten years of the Reforms have rolled by without relaxing the least the control of the executive over the judiciary. The combination of the two functions was a part and parcel of the old despotic system which it was the intention of the Reforms to modify, if not to replace. The separation of the two powers would have been the most fitting reform under the new regime. The right of the people to vote at the elections and send their representatives to legislatures becomes a chimera if it is not accompanied by their immunity from the vagaries of the executive officers. Political liberty and civil liberty must go hand in hand. But the forces which had fought the initiation of the Reforms as long as they could now combined to whittle down their implications as far as possible. The Civil Service with its allies stood, as a solid phalanx, against any measure that would further curtail its authority and powers. Throughout the period of the Reforms, it set its face against the separation of criminal justice from executive functions.

Such was the painful experience not of Bengal alone during the last ten years. The other provinces also found all the forces of the Civil Service similarly arrayed against them in their efforts to free criminal justice from executive shackles. In Behar, in U. P. and in the Punjab, expert Committees like that in Bengal were set up to frame suitable schemes for the separation of the two functions. In Assam and the Central Provinces also the Government promised to meet the public demand in this matter at the earliest convenience. But nothing came out of these schemes and promises. The old despotic system of District administration continues everywhere as before. The history of popular agitation for this reform during the last decade is thus, in every province, a story of ingenious evasion on the part of the Government and baffled attempts on the part of the people's representatives.

CHAPTER IV.

THE EVILS OF THE COMBINATION IN THE MAGISTRACY.

The union of executive and judicial functions has very naturally brought in its train certain very dangerous evils which only their complete separation can eradicate. It has invested the District and Sub-divisional Officers with powers which, human as they are, they must abuse, in a greater or a smaller degree. It is not in the nature of things that an Officer will discharge his executive duties vigorously and efficiently and perform at the same time his criminal judicial duties correctly and impartially. It is humanly impossible for him to divide his duties into two compartments, completely separate and not the least influencing each other. It is on the contrary quite natural that such an Officer would use his judicial powers to subserve executive expediency. His executive duties become primary and his judicial duties only secondary and auxiliary. The District Officer and his Deputy in the Sub-division are the local satraps in India. They are the representatives of the Raj in their areas. They are responsible for maintaining law and order in the localities under their charge. It is they who have to supervise and control the police in the detection of crime, the investigation of cases and the apprehension of criminals. They are responsible to the Government not only for maintaining peace but also for looking to every other interest of the Government. They are thus executive officers *par excellence.* Their bias is pre-eminently executive. They are the sword of the State. Now if, under these circumstances, they are also invested with the mace of justice, they would only place it under the sword. Their judicial powers would only be a hand-maid to their executive authority. The fusion of police powers with criminal justice thus places the liberty and freedom of the people at the disposal of the executive officers. A man, for one reason or another obnoxious in their eyes, may fall a victim to their high-handedness. The criminal courts,

if independent, would bring him out of the police clutches and restore him to freedom. In India, however, these criminal courts are under the thumb of the executive. They would consequently only confirm the action of the police and clap the man into prison. People thus have to live under the sword of Damocles constantly hanging over their head. The gravity of the danger that threatens the liberty and freedom of the individual is brought out into relief, when the judicial powers of these executive officers are fully enumerated.

The District Officer is by virtue of his position a Magistrate of the first class and can as such pass sentences of imprisonment upto two years with hard labour and of fine up to one thousand rupees.[1] He is also an appellate judge, all appeals from a conviction by a second or third class Magistrate lying with him.[2] In his capacity as the District Magistrate, he has also wide powers of control over all other Magistrates of the District. He can transfer a case from the file of one to that of another Magistrate. He has also to call for and look over the records of all the Magistrates in the District. "He makes a daily inspection of the register of cognisable cases and also inspects the trial registers of the different courts. He also from time to time examines a number of records disposed of by each Magistrate,...and keeps himself informed of the progress of all serious cases reported."[3] The Sub-divisional Officers also are mostly Magistrates with first class powers. They distribute cases among the different Magistrates and exercise some control over them as to their discipline and conduct. In certain provinces, they also hear appeals against the decision of the second and third class Magistrates.[4]

The District Officer is, of course, a very busy man and his time to try original criminal cases is consequently very limited. In fact during the last fifty years, in the Regulation Provinces,

1 The Code of Criminal Procedure, Section 32 (1) (*a*).

2 *Ibid*, Sec. 407 (1).

3 Report of the B and O Committee on Separation (1922), Vol. I, p. 21.

4 *Ibid*, p. 11.

he could take on to his own file only a few original cases. The appellate work, however, he had to perform in full till the close of the first decade of the twentieth century. Now-a-days, he does very little judicial work, in some districts nothing at all. In some places, an Additional District Magistrate has been set up and he discharges all the judicial duties entrusted to the District Magistrate. In some other districts again, where there is no Additional District Magistrate, these duties are generally delegated to a senior Deputy Magistrate. But it is clearly immaterial whether the District Magistrate himself tries any criminal case or not. That does not affect in the least the position of the people *vis-a-vis* the executive. The thing that really matters is the supervision and control which he exercises over the Magistracy of the District. He may not try a single case but he may, if he likes, influence the decision in every case. All the other Magistrates of the District have to look upon him as their chief. Their promotion and prospects in the service depend very largely upon his notion of their conduct. The Deputy Magistrates especially have to look to him for their advancement in the Service. The District Officer thus presides over their official destiny. They have therefore to keep him in good humour and cultivate his sympathy and support. They cannot for any reason go against his will. The man who controls anybody's future prospects, ordinarily controls also his conscience. This is a self-evident truth. The Deputy Magistrates again belong to the Provincial Executive Service and are not in a judicial cadre with judicial duties alone to perform. Temporarily they may be deputed to criminal judicial work but soon they may be given some executive duty. Uniformly they are not engaged only in judicial work. They interrupt it or combine it with some executive functions. Consequently, they develop some executive bias and come to look upon themselves as the executive agents of the Government. It becomes difficult, if not impossible for them, to bring to bear an open mind on a case in which any interest of the Government may be involved. So they start with an original prejudice which is further aggravated by the control

exercised over them by the District Officer and his official superiors. ✓The Deputy Magistrates hold their office during the pleasure of the Provincial Government. Their promotion and transfer are all determined by that Government. They have to get over three efficiency bars before reaching the top places in the Service. They cannot get over these bars without the favourable recommendations of the District Officers under whom they happen to serve. They are hence completely under the thumb of the District Magistrate. In no case, in which the local representative of the Government is interested, have they any independence. They only pronounce the verdict as dictated or desired by the District Officer. They are only the conduit-pipe through which is conveyed the decree of the executive. The voice may be the voice of Jacob but the hand is the hand of Easau.

Now there are various methods by which the independent judicial discretion of the trying Magistrates is interfered with by the executive. A case has been sent up by the Police and the accused are having their trial before a Magistrate, when a demi-official letter is addressed by the District Officer to the trying Magistrate instructing him as to what he should do. This practice of issuing demi-official "chits" to the Magistrates during the progress of a case has always been very common in the older provinces. It is not always possible to discover that such 'chits' have actually been addressed by the District Officer. Now and again, however, they luckily for the accused and the public fall into the vigilant hands of the defence counsel. The late Mr. Manmohan Ghose, in his famous interview with the representative of 'India', brought this aspect of executive interference with judicial fairness into public notice. One instance will suffice to show clearly the nature of interference with the ordinary course of justice which the issuing of such "chits" involves. In 1905 when the Swadeshi movement in connection with the partition of Bengal was in full swing in this province, the District Officers were bent upon crushing the boycott movement somehow and clapping the emissaries of this movement anyhow into prison. In November 1905, it was alleged that

Rajendra Lal Saha, a young boy only fourteen years of age, had had a scuffle with a dealer of Manchester cloth in a bazar in the interior of the Sub-division of Tangail, in the district of Mymensingh. The boy was taken into custody and placed before the Sub-divisional Magistrate of Tangail. The District Officer of Mymensingh now lost his sleep over this case. The prosecution case was supposed to be very feeble and the witnesses seemed to be got up. They might break down under efficient cross-examination and the case might collapse on that account. Now to avoid any such contingency and ensure the punishment of the boy, Mr. C., the District Magistrate of Mymensingh wrote a demi-official letter to the trying Magistrate on the 28th November. "In the case under section 147 I. P. C. against Rajendra Lal Saha and Purna Saha (The Balla disturbance case)," he wrote, "please take care that the case is disposed of promptly and the prosecution witnesses are not unnecessarily troubled. Let me have a copy of the orders you pass on the order sheet each day the case comes up for trial." After this, there could be no doubt as to the result of the trial. The young boy was promptly sentenced to rigorous imprisonment for fourteen days and a fine of sixty rupees.[5]

Cases crop up again which may have been instituted at the instance of the District Officer himself or in which he may be otherwise directly interested. He certainly invites conviction in such cases and the fact that he is keen about it is quickly noised about. The subordinate Magistrate who has to try a case like this does not wait for a 'chit' or any verbal instruction from the District Officer. It has already reached his ears that a conviction is wanted and he proceeds to record one irrespective of the merits of the case. He does not think himself quite in a position to exercise free judgment in such cases. The public also for obvious reasons does not cherish the least confidence in his impartiality and very frequently applies to the High Court for the transfer of the case to a Magistrate in

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5 The letter somehow came to be published in the Amrita Bazar Patrika. See A. B. Patrika for 23rd March, 1906.

another district. One or two instances would testify to the miscarriage of justice that takes place so often in such cases. Mr. Nittyadhone Mookerjee of Howrah was a Swadeshist and a public-spirited member of the local Municipality of which the District Magistrate himself was the Chairman. As an elected Municipal Commissioner, he thought it his duty to guard the interests of the rate-payers from executive perversity and recklessness. He did not hesitate to show up the vagaries of the Magistrate-Chairman. All this independence and public spirit, however, rendered him obnoxious to the Municipal and District Executive and in April 1907, the Magistrate-Chairman proceeded to take his revenge upon his opponent in the Municipal Council. A petition was brought rather in a mysterious way to the District Magistrate that Mr. Nittyadhone Mookerjee had, in his capacity of a Municipal Commissioner, induced one Enayet Khan to deliver to him an amount of ten rupees by promising to obtain for him a licence to open a shop for refreshments. The District Magistrate took action upon this mysterious petition and directed the police to send up the case in the usual form under section 420 I. P. C. The Joint Magistrate of Howrah who was also a Commissioner of the Municipality was asked to try the case. The accused suspecting that he might get no justice from a Magistrate subordinate to the District Magistrate who was the prosecutor, applied to the High Court for the transfer of the case and meanwhile requested the trying Magistrate to postpone the trial. The Joint Magistrate, however, refused to give him any time to move the High Court and insisted on examining the witnesses immediately. The criminal bench of the High Court thought that this attitude of the Joint Magistrate proved his prejudice in the case and precluded him from trying it. But the bench could not assume without conclusive reasons that "all the subordinate Magistrates of Howrah are so subservient to the District Magistrate that they will fail to do justice simply because the District Magistrate is supposed to have some bias against the accused. There is always and very properly a presumption that every judicial officer has a free conscience." Accordingly the District Magistrate sent the

case to the file of the Deputy Magistrate, Mr. M. Now what was this poor gentleman to do? He knew that the District Magistrate was specially interested in this case and certainly wanted a conviction. If he now proved by his conduct that he had a free conscience of which the High Court had spoken and discharged the accused, his Chief might stand in the way of his promotion or have him transferred from the enviable station of Howrah to some distant unhealthy place. So he sacrificed his conscience and acted up to the promptings of self-interest. He humoured the Officer upon whose good grace hung his future and sentenced Mr. Nittyadhone Mookerjee to rigorous imprisonment for three months. An appeal was filed in the Court of the District and Sessions Judge of Hooghly and Howrah who quashed the sentence and acquitted the accused. He thought the story of the prosecution was "grossly improbable" "with grave causes for suspicion all along the line."[6]

Not infrequently also it occurs that the District Magistrate calls for his subordinate and asks him not to proceed with a case without consulting him. In 1892, a warrant was issued against Pravat Chandra Nag a zemindar, by the Joint Magistrate, Mr. G. of Comilla. As it could not be served, a proclamation was issued on the 4th November to the effect that Nag must attend the Court within thirty days. But it came to his notice on the seventh of the following month when thirty days had already long expired. Later on the case came up before a against Pravat Chandra Nag a zemindar, by the Joint-Magistrate, Mr. G. The case, however, was compromised and the accused let go. But this was not to the liking of the District Officer whose enmity Nag had somehow incurred. Hence a fresh case for wilful disobedience of the proclamation was instituted against him under section 174, and the case came up for trial before the Deputy Magistrate Mr. R. Now the charge against Nag could not certainly stand. The proclamation was to the effect that he must attend the Court by the 3rd of December.

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6 See the A. B. Patrika. The issues of 23rd, 25th, 26th September, 1907 and 2nd October, 1907.

But he noticed this order only on the seventh of that month when he appeared in the Court. Hence how could he be said to have wilfully violated the proclamation by not attending during the period specified? The Deputy Magistrate, however, could not exercise his independent judicial discretion and acquit the accused. He had been asked by the District Magistrate to do nothing without consulting him. The conversation between the Court and the defence pleader is interesting.

The Defence Pleader:—I submit, I am ready to enter into my defence if the Court so desires; but I think that is unnecessary as no case has been made out against my client, and I am entitled to an acquittal.

The Court:—Wait, gentlemen, I shall go and see the District Magistrate first.

The Deputy Magistrate then left the Court, saw his Chief and returning in a few minutes observed, "this is a very serious case. The accused cannot be leniently dealt with. The District Magistrate does not consider fine to be an adequate punishment in a case like this." So Pravat Nag was sentenced to imprisonment for two weeks and a fine of Rupees two hundred.[7] One more illustration will be enough to understand the position of the subordinate Magistrates.

In what is known as the Barisal Delegates' case, some delegates to the Bengal Provincial Conference of 1906 which was being held in this town, were assaulted by the police at the instance of the Superintendend of Police himself. After the incident, they went to the neighbouring Police Station to enter their case in the Police diary. On the officer in charge of this Station refusing to record the information, their counsel appeared before the Senior Deputy Magistrate to make an application for

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[7] See the A. B. Patrika for 22nd September, 1893. Editorially the Patrika in the same issue wrote: "We hope some M.P. will place this dialogue before Lord Kimberley and try to convince him that the scandal of this executive interference with the judicial work of the subordinate Magistrates has reached its climax in this country and ought to be removed as speedily as possible."

process against the accused. The conversation that followed this application between the Court and the counsel brings out into relief the pitiable position of the Deputy Magistrate.

Court :—The standing order on me is to record the complaints and send them up to the (District) Magistrate.

Counsel :—Such standing orders are not known to law.

Court :—My power of receiving complaints come from the (District) Magistrate.

Counsel :—As Magistrate, you are to follow the legal procedure, I cannot take notice of any standing order not in accordance with law.

Court :—Two accused are Europeans, I cannot try them.

Counsel :—You may not try them but you can issue process against them.

Court :—The order delegating power to me by the (District) Magistrate is that I am to record the complaints and then refer them to the (District) Magistrate. I understand he wishes to withdraw the case from my file. My duty is of a clercial nature. That is what I have been ordered to do in this matter. My hands are not quite free."

Again,

Court :—The order of the (District) Magistrate is to submit the papers to him.

Counsel :—Before doing so, you are bound to issue process as there is a *prima facie* case before you. You must record an order either under section 202 or section 204 before sending the records to the (District) Magistrate.

Court :—I shall only submit the record to him for orders without any remarks of my own.

Counsel :—I object to this as contrary to law.

Inspite of these protests, the records were sent to the District Magistrate through the Bench Clerk who shortly returned with the following order, noted on the petition—"complaints dismissed and struck off." On this, the High Court was moved and their Lordships held that the action of the District Magis-

trate "was in contravention of the law" and the direction to the Deputy Magistrate to submit all complaints to the District Magistrate for passing orders "was clearly illegal."[8]

Some Deputy Magistrates in the absence of any instructions from their Chief, try to be independent and convict and acquit at their discretion. This, however, has its dangers. Mr. Manmohan Ghose in his interview, already referred to, remarked how a Deputy Magistrate showed him with fear and trepidation an autograph letter written to him by the Divisional Commissioner. In this letter, the Commissioner had expressed his disapprobation of a particular judgment which the Deputy Magistrate had delivered some time earlier. In consequence of this disapproved judgment, his promotion had also been stopped by the Lieutenant-Governor for a term of years. The Government treated him so vindictively although his verdict was affirmed, on revision, by the High Court.[9] Naturally when such treatment was expected at the hands of the Government, the subordinate Magistrates who had any experience of the administration of criminal justice would always like to be on the safe side. They would do everything to consult the wishes of their Chief before coming to any final verdict in a case in which he might be the least interested. The attitude of Maulvi Zakir Hussain, the trying Magistrate in the Chupra case which has been made famous by the historic judgment of the District Judge, Mr. Pennel, is hence quite intelligible, though not supportable. In 1899, Narsingh Singh, a Police Constable on leave and in indifferent health, was asked by Mr. C. the Assistant Police Superintendent of Chupra, to do some earth work in connection with a *Bundh*. On his refusing to do so, Mr. C beat him and kicked his bottom. Mr. S, the District Engineer, who had accompanied Mr. C also gave him some cuts with his rattan. The incident soon got abroad and it could be expected that the matter would be taken to the Court of Law. In order

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8 The case is incorporated in full in Sir P. C. Mitter's The Question of Judicial and Executive Separation (1913), pp. 21-23.

9 P. C. Ray—Op. Cit., p. 169.

to forestall this, the District Magistrate, Mr. T, took Narsingh into custody and sent him up for trial on a charge of assaulting Messrs. C and .S The case came up for hearing in the Court of the Senior Deputy Magistrate, Maulvi Zakir Hussain. Now this Magistrate knew quite well that his Chief, the District Officer, was interested in the case. Accordingly in the course of its hearing he went over to the District Magistrate and took instructions from him as to the way he should dispose of the case. In his own words, "I have been a Deputy Magistrate for twenty-seven years. I have before this served under very young District Magistrates. I have discussed pending cases with them similarly. It is not the fact that I discussed the cases with them because I wanted to know what they wished me to do—it was to avoid after troubles. What I mean is that sometimes when cases are disposed of and District Magistrates do not like it, they find fault and so I settled it beforehand." And this time he settled it to the victimisation of an innocent and already injured man. Narsingh was sentenced to a rigorous imprisonment for two months. Fortunately Maulvi Zakir Hussain was a Magistrate of the first Class and the appeal from him lay with the District and Sessions Judge, who not only set the poor accused free but exposed mercilessly the character of the case and the subserviency of the trying Magistrate. "It certainly does seem to me," Mr. Pennel observed, "that Maulvi Zakir Hussain's predilection for satisfying his superior at all costs might find more legitimate indulgence on the revenue side, and it would be a grave scandal if he be retained as a Magistrate in this neighbourhood."[10]

The Magistrates in an Indian District have not only to adapt their decisions to the wishes and opinions of their superior, the District Officer, but they have also to ingratiate themselves with the Superintendent of Police. They have so to acquit themselves as not to allow their names to be entered in his bad books. The Indian Raj is a police raj and the interests of the police are paramount in this country. The Magistrates, and as

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[10] Ibid, Appendix B., pp. 331-348.

we shall see later even the Sessions Judges, have to curry favour with the police. If a subordinate Magistrate goes against the demands of the police in what they regard as a clear case, they will not wait for the verdict of the higher court and allow the Magistrate to pass his judgment unhampered. They will immediately approach the District Officer who as the common head of the two departments will now intervene and ask the Magistrate to act according to the dictates of the police if his judgment has not been delivered already, and warn him for the future if his verdict has been issued. These things generally happen behind the *purda*, but now and again the curtain is a bit tucked up and the people have a glance at these ugly pictures. In 1895, the police of Purulia sent up some men in A form. The case came up for trial before the Deputy Magistrate, Mr. U. C. Mookerjee. He did not think it necessary to refuse bail to the accused. He at his own judicial discretion allowed them to go out of the lock-up on furnishing suitable securities. This concession, however, could not meet with the approval of the Superintendent of Police who wanted the accused to rot in the *Hazat* till the conclusion of the trial one way or the other. He ran to the District Officer, Mr. Morshead, and complained to him against the conduct of the trying Magistrate. The District Officer immediately asked Mr. Mookerjee to withdraw the order for bail and put back the accused into the lock-up. The poor Deputy Magistrate had now to repudiate his previous order and put back the accused into the *Hazat*. Now this action of Mr. Morshead was clearly illegal. The Criminal Procedure Code does not give him any such revising powers. A question was put in the Bengal Legislative Council by Mr. Surendra Nath Bannerjee as to this conduct of the District Officer and the steps which the Government would take against him. The Chief Secretary, Mr. Herbert Risley, replied that the action of the District Officer was technically wrong but it was a *bona fide* mistake and the Government did not want to take any disciplinary action against him.[11] Nowadays when

[11] Proceedings Vol. XXVIII, pp. 315-19.

the Superintendent of Police would complain to the District Officer against the judgments of the subordinate Magistrates, he would certainly reprimand and warn them but would do nothing illegal like Mr. Morshead which might create opportunities for a row anywhere. The police recently in a district town in Bengal, sent up some men for trial on charges of creating disturbance and breach of public peace. The police thought that it was connected with the illegal preparation of salt, but did not mention anything about it in their reports. The trying Magistrate took a lenient view of the case and sentenced the accused to a fine only for their offence of disturbing the public peace. The police were dissatisfied with the sentence. They expected something more severe and drastic. In their wrath, they approached the District Magistrate and placed the matter before him. The District Magistrate at once called the trying magistrate to his Chamber and demanded an explanation. The latter explained his conduct and the District Officer seemed to be satisfied. Now the District Officer had no business to demand an explanation of the trying Magistrate. If the police thought the punishment that had been awarded was insufficient, it was open to the Government under the Criminal Procedure Code to appeal to the higher Court for an enhancement of the punishment. The executive should have taken its chance before the court of appeal. But the District Officer took advantage of his position as the superior officer upon whose recommendations the trying Magistrate's future depended, and informally asked him to explain his conduct. Now every subordinate Magistrate would like to avoid this informal reprimand. He will always like to keep the police in good humour. He will allow them no opportunity to go over to the District Officer and persuade him to give him a rebuke which any time may result in his transfer to a less congenial place or even the stopping of his promotion. So the Magistrates are under the thumb of the police. A lawyer member of the Punjab Legislative Council had enough experience of the position of the Magstrates to observe that "a mere Head Constable of police can twist the magistrate round his little finger and the latter dare not bail

out the accused without the concurrence of the Deputy Commissioner and the police officials." "In my own district," he pointed out further, "at least one meeting is held every month attended by the Deputy Commissioner, Superintendent of Police and the Magistrates of the district, and in that meeting the policy to be followed is chalked out and all the Magistrates... carry it out to the letter. Only recently I requested a Magistrate to take up my case as I had to go to the Council, but he refused to do so because he had to consult the Superintendent of Police in another case."[12] The police are thus all-powerful. The Magistrates simply are the agents that register the decisions of the police. Even the District and Sub-divisional Officers who are the head of the police in their jurisdictions, are not without their fear of the police. Their position is absolutely anomalous. They are the head of the Magistracy, as also of the police. Generally they look upon their executive functions as primary and their judicial functions as secondary and even as auxiliary. But here and there are officers who stray from the common herd and make an attempt to be faithful to their Magisterial duties. They refuse to accept police evidences always as gospel truth and convict uniformly at the instance of the Court Inspector. If, however, they discharge the accused in an important case, or if unimportant police cases break down frequently in their court, they are sure to invite the odium of the police upon their head. The Superintendent of Police will now send one report after another to his departmental superior, the Inspector-General of Police who in his turn will put the matter before the Chief Secretary. The Chief Secretary will then take disciplinary action, if the explanations of the defaulting Officers prove to him unsatisfactory, and they will in time get notice of their transfer or meet with some punishment more severe still. To pull on well with the police is the first duty of the Magistrate of every grade.

We have so far spoken only of the Magistrates being influenced and hampered in their judicial duties by the Execu-

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[12] Punjab Legislative Council Debates, Vol. XI—No. 10, pp. 470-471.

tive over them. Nothing has been said yet of the Executive Officer himself sitting in judgment upon cases in which he is directly interested. The District Officer does not try many cases in the older provinces. But even in the few cases he tries incalculable damage is done to the interests of the accused. In April 1930, the Civil Disobedience movement was started against the Government in this country. The Working Committee of the Indian National Congress was giving the lead to this movement. After the arrest and conviction of its President, Pandit Mati Lal Nehru was nominated to the office and he became now the head of the executive committee that guided the Civil Disobedience movement. Naturally he became the *bete noire* to the Government. He was looked upon as a man working for the subversion of the established order of the country. The Government now must put him out of the way. Accordingly, Pandit Nehru was arrested at 5 A.M. on the 30th June, 1930. The arrest was decided upon by the Provincial Government in consultation with the Central Government. The District Officer of Allahabad where Panditji had fixed up the Congress head-quarters, must also have been consulted. He at least was in the know all about it. He was one of the Officers who had effected the arrest. He was hence one of the prosecutors. As an actual prosecutor, and as a limb of the great executive body which had ordered the arrest, he was certainly interested in the conviction of Pandit Nehru. It was hence imperative that he must not sit in judgment on the accused. But the trial was actually held by him and Panditji was sentenced to six months' imprisonment. The charges that he framed and the judgment that he delivered leave nothing to be proved that he was out somehow to clap the accused into prison. Two charges were framed against the accused, one under section 117 for abetting certain offences and another under section 17 (*1*) of the Criminal Law Amendment Act for being a member of an unlawful body. In the warrant that was issued against him, there was mentioned only the section 117 which makes the abetment of certain offences punishable. It did not allude to his being a member of an unlawful assembly.

This in fact could not be mentioned in the warrant. The Working Committee of the National Congress was declared unlawful by the U. P. Government with effect from 4 A.M. of June 1930, while Panditji was arrested only one hour later. The Officers effecting the arrest had no knowledge till several hours later that the Working Committee had been so declared. Panditji, of course, was quite in the dark about it. He had hence no opportunity of giving up his membership of the unlawful body, if he so liked. In the course of the trial, the Magistrate thought it wise to charge Panditji with the fresh offence of being a member of the body declared unlawful. Possibly he did it with the purpose of strengthening the prosecution case. The weakness of this charge was however brought home to him. "It is indeed admitted," he writes in his judgment, "on behalf of the prosecution that the law is hard in that it was not possible for the accused at the time of their arrest,...to have known that the Association was unlawful." But this did not deter him from finding Pandit Nehru guilty on both counts, and he was sentenced on each charge to imprisonment for six months. That the Magistrate was overzealous and the trial on some points irregular was apparent to all. Two members of the Allahabad bar drew the attention of the High Court to the irregularities of the trial. The High Court then in exercise of its powers of revision called for the records of the proceedings of the trial. They were placed before the Chief Justice and Mr. Justice Sen on the 18th July 1930. The Government Advocate conceded on behalf of the U. P. Government that the conviction and sentence under Section 17 (*1*) for being a member of an unlawful Association might be invalid. But he held that the sentence on the other count was quite in order. The Court also agreed with him and set aside the first conviction but maintained the other. It must be mentioned in this connection that the accused went undefended throughout. This is how an Executive Officer in charge of the administration of a district would try a man who had put himself in opposition to the Government.[13]

[13] See the *Statesman* for 2-7-30 and *Advance* of 19-7-30.

In the so-called non-Regulation Provinces, the District Officer has still to make time to try a number of cases. But in trying them he does, not unnaturally, forget that he is acting in his judicial capacity and not discharging any executive business. One instance is enough to bring home to the public the nature of the evil involved in such criminal trials. About 1918, in the Punjab, a Tahsildar was killed by the residents of a certain village while he was busy recruiting soldiers for the army. The Tahsildar was accompanied in this campaign for recruitment by one Taz Mahmud, a Zaildar of another village. He also received many injuries at the time and escaped death by concealing himself in a mosque. Some of the assaulting party were brought to book immediately but the others absconded. In 1925, some men were brought under arrest on suspicion that they were the absconding offenders. Taz Mahmud who was one of the eye witnesses of the murder and assault, was now called upon to identify them. Not unnaturally he expressed his inability to do so after so many years. This attitude of Taz Mahmud, however correct, gave offence to the District Magistrate of Shahpur. He was arrested and sent up for trial under Section 193 I. P. C., and the District Magistrate himself tried the case. He started with a bias against the accused and committed many judicial irregularities. No facilities were given to the accused to defend himself properly. The trial was not held at the head-quarters. It was held by the District Magistrate in a distant, inaccessible village. The climax was reached when at one o'clock in the morning judgment was delivered and the accused clapped into prison. It must be mentioned that the District Magistrate, during the progress of the case, used to hold consultations in his private room with the Public Prosecutor and the Court Inspector. On certain occasions, he even held consultations with the prosecution witnesses before their examination in the Court. He even boasted that he did so. "I am the head of the prosecuting agency. It is my business," he said, "to see that the case is properly put before me by the prosecuting agency, in order that my time may not be wasted in

recording unnecessary depositions. I used to hold consulation with the prosecuting agency and with witnesses in order to see that the evidence was properly placed before me." No wonder after this that the High Court, when it came to deal with this case, unreservedly condemned the action of the Magistrate. "The proceedings taken by him," the High Court observed, "betray his ignorance of the elementary principle of justice that a person cannot simultaneously perform the functions of a prosecutor and a judge in a criminal case. The Magistrate does not realise that he ceases to be an executive officer when he is sitting in Court to try a criminal case."[14]

One or two instances will similarly prove the danger to personal liberty from the combination of the two functions in the Sub-divisional Officers. Both in the Regulation and the so-called non-Regulation Provinces they are the executive officers of the Sub-division with all their supervising and controlling authority over the local Police. They at the same time regularly discharge their criminal judicial duties. They thus enjoy an extensive power which when misused threatens the liberty of the individual. In 1901, the Sub-divisional Officer of Magura in the District of Jessore was somehow offended with a village Panchayet, named Kedar Nath Ghose. He now vowed to teach him a lesson. He waited for a pretext on which the poor man might be taken into custody. A plea was soon found and Kedar Nath was prosecuted on a charge of misappropriating Re. 1/- collected by him in his capacity of the village Panchayet. The Sub-divisional Officer himself held the trial, convicted and sentenced him to three months' rigorous imprisonment and a fine of Rs. 400/-. The case was on appeal carried to the District and Sessions Judge who characterised the alleged misappropriation as nothing but an error of book-keeping and acquitted the accused. The ire of the Sub-divisional Officer was now roused still further, and a few days after his release, Kedar Nath all on a sudden

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14 Punjab Legislative Council Debates, Vol. XI—No. 10, pp. 457, 458, 459, 472.

found himself summoned to answer a charge under section 217 I. P. C. No proceedings were drawn up against him but all the same he was hauled up and released on a bail of Rs. 500/-. He was to appear before the Court when called upon to do so. A few days later, a robbery took place in a neighbouring village and Kedar Nath was at once arrested on suspicion and sent to the lock-up. He was refused bail and remained in the *hazat* for about twenty days, and all this inspite of the fact that the Police were still investigating the case and did not yet send up the A form. The Sessions Court was now moved and his release on bail was at once sanctioned. The Sub-divisional Officer got this order on a Sunday and on the morrow he called upon the accused to name two sureties ; in the course of an hour they were named but meanwhile the Sub-divisional Officer had left the station and would not come back from the Mufassil the next three days. The District Judge's order was thus practically violated and the Sub-divisional Officer was satisfied that he had been able to keep Kedar Nath sufficiently long in the lock-up. A private grudge was thus fed fat.[15]

Criminal justice has thus been throughout dependent upon the exigencies of executive administration and the freaks of executive officers. It has known no independence and for that reason no fairness and impartiality in cases in which the executive has been the least interested. The Government also instead of condemning such interference, have encouraged it in every possible way. Sir Henry Cotton has recorded in his Memoirs that the Civilians in his days "were encouraged to exercise considerable executive interference with the ordinary course of justice."[16] The Provincial Governments and the Commissioners of Divisions criticised in their Administrative Reports the actions of the criminal judiciary and suggested how trials should be held and what punishment awarded. All the Magistrates have all along been appointed by the Govern-

[15] See the *A. B. Patrika* for 24-8-01.

[16] Sir Henry Cotton—Indian and Home Memories (1911), p. 94.

ment. They have been also promoted, transferred, degraded and dismissed by the same authority. They have been thus the servants of the Provincial Executive working under its direct control, and as such expected to carry out its will in every department of public administration with which they remain associated for the time being. It has never occurred to the Government that once the laws are passed and the procedure of the courts determined, it is not for the executive to see as to how the trials are held and the accused dealt with. They are the functions of the highest tribunal in the province, the High Court. When Sir Charles Elliott became the Lieutenant-Governor of Bengal in the early nineties of the last century, he took it into his head that while crime was rife in the province, criminal administration was lax. The remedy he devised for rectifying this state of things was more dangerous than the disease itself. He did not attach much importance to the better and more efficient organisation of the forces of law and order. He did not think it of much moment that the police should be more skilful in detecting the real offenders, in collecting the proper evidences and in every way strengthening the cases they sent up for trial. This aspect of the question he rather neglected and put all the emphasis on the conduct of the criminal judges. In 1891, he issued a circular to all Commissioners of Divisions and District Officers drawing their attention to the number of adjournments indulged in and the number of witnesses allowed and examined in a case. He thought they were too many and should be cut down to a fixed maximum. He also asked the District Officers to keep a sharp eye on the trying Magistrates and bring home to them the necessity of rapid decision and good conviction.[17] In the following year, the Government Resolution on the administration of criminal justice in the Rajshahi Division referred again to the charge of too many witnesses being allowed and too many adjournments made.[18] In 1895, Mr. Forbes, the Commissioner of the Patna Division issued

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[17] See *A. B. Patrika* for 30-11-93. [18] *Ibid*, for 28-2-93.

a circular directing the Magistrates in the Division to take regularly to whipping by way of punishing certain classes of offenders. When the alternative of whipping was at hand, young men of twenty-one or less should not be imprisoned by the Magistrates without a special reference to the District Officer.[19] In 1896, the Commissioner of the Presidency Division, Mr. P. A. Westmacott, wrote a letter to the District Magistrate of Nadia drawing his attention to "a disproportionate number of acquittals in the cases tried by the Magistrates and the Benches noted in the margin."[20] Certain District Officers also took their cue from the Lieutenant-Governor and the Commissioners of Divisions and issued general circulars to the Magistrates under them. Thus the District Magistrate of Khulna passed an order to the effect that in no stamp case should a Magistrate fine less than five rupees.[21] The District Officer of Saran similarly issued a circular asking the Deputy Magistrates not to be lenient but to inflict heavy punishment in excise cases.[22] When the Government of Bengal were depriving the Magistrates of their independent discretion and turning them into mere post-offices and conduit-pipes, the Government of the North-Western Province could not be expected to lag behind. Sir Charles Crosthwaite, the Lieutenant-Governor of this province, issued a circular in September, 1893, on the administration of criminal justice to all Commissioners of Divisions and District Magistrates. In this circular, he urged that the District Magistrates should more frequently supervise the Magisterial work of his subordinates and instruct them as to how they should proceed in particular cases. Whipping should be more freely resorted to and Magistrates with second and third class powers should, instead of sentencing themselves, commit the accused to the

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19 Proceedings of the Council of the Lieutenant-Governor of Bengal, Vol. XXVIII, pp. 11-12. Mr. Cotton informed Mr. A. M. Bose that the circular had been withdrawn by order of the L.-G.

20 *A. B. Patrika* for 6-8-96.

21 Proceedings of the Bengal Council, Vol. XXVIII, pp. 41-42.

22 *Ibid*, 243-244.

higher court so that a more severe punishment might be meted out to them. In the riot cases, the Lieutenant-Governor emphasised, the Magistrates should never sentence the accused to simple imprisonment, it must be always one with hard labour. So the Magistrates must not have any independence and discretion. They were practically reduced to the position of assistants to the Lieutenant-Governor for hearing the cases and writing out the judgments according, of course, to his preconceived ideas.[23]

In the nineties, this interference of the executive with the judiciary which had always been present before and since, became so open and brazen-faced that the High Courts could not long maintain silence. The High Court of Bengal, under the leadership of Sir Comer Petheram, the Chief-Justice, protested to the Lieutenant-Governor that this policy of the Government would lay axe at the root of the right and proper administration of justice in the Province of Bengal. But Sir Charles Elliott turned only a deaf ear to these protests. The High Court now had no alternative but to move the higher authorities and on the 17th August 1892, sent a letter on the relations between the executive and the judiciary to the Secretary of State through the Government of India. The Government of India, then headed by Lord Lansdowne, in forwarding this letter practically took the side of the Lieutenant-Governor of Bengal and supported, though mildly, the right of the executive to criticise and interfere with judicial decisions. The Secretary of State, thus tutored by the Government of India, replied a few months later in a vapid non-commital way. "While I am not prepared to admit," observed the Secretary of State, " that cases may not occasionally arise in which it is the duty of a Government in India to criticise judicial errors, I think it necessary in the interests of the Community that the administrative officer, of whatever rank, should abstain from publishing officially reflections upon the decisions and judicial acts of Magistrates and courts of law."[24]

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23 *A. B. Patrika* for 11-10-93 and 12-10-93. 24 *A. B. Patrika* for 26-8-93.

After this reply of the Secretary of State to the High Court of Fort William, the Government of India directed the Provincial Governments not to criticise publicly the decisions of the Courts of law. The Bengal Government accordingly sent out a circular on the 25th August 1893, to the Divisional Commissioners asking them not to make any reflection on judicial decrees in departmental reports or similar documents.[25] Henceforward, these reflections became scarce in Administration Reports but otherwise criticism of and interference with, judicial decisions continued as before. In private letters, in demi-official 'chits,' in confidential circulars, the Lieutenant-Governor and his Divisional and District Officers went on merrily interfering with the decrees of the Magistrates and insisting on decisions to their liking.

The Government of Bengal under Sir Charles Elliott were not content simply with enunciating general lines and principles on the basis of which the Magistrates should carry on their work. They devised a method by which the Magistrates of every description might be compelled to convict men as they were sent up by the police. They initiated a new principle in judicial administration—no conviction, no promotion. Practically a percentage system was introduced. Unless a Magistrate could show to his credit about seventy-five per cent. of convictions, he was sure to be looked upon by the Government as worthless and his promotion would be automatically stopped in consequence.[26] No wonder therefore that the Deputy Magistrates trembled in their shoes when they had to try men against whom there was no convincing evidence. If they acquitted such men, they would run the risk of losing the good opinion of their masters. They had hence to harden their heart and send them to prison though possibly they were innocent. The poor Magistrates must make their conscience very elastic, if they wanted advancement in their

25 *Ibid,* 3-10-93.

26 "The percentage of convictions of a Deputy Magistrate is lower than seventy-five and forthwith the Government writes to him to explain why his work is so unsatisfactory." *A. B. Patrika* for 16-2-93.

service. They must sacrifice their respect for justice, if they did not want to give up their love for promotion. They must dispose of cases without adjournments otherwise they would be regarded as worthless. They must allow only as few witnesses as possible, otherwise they would be dubbed as lenient. They must show a considerably higher percentage of convictions than acquittals otherwise they would be taken to be weak and incompetent. They must also make a good use of whipping for if their whipping list was blank they would be taken to task.[27] Once in service, every man desires promotion to a higher grade and increase in emoluments. It is not unnatural on this account that most of the subordinate Magistrates would fall in with the ideal of the Government and convict as promptly as possible. Here and there of course, there were exceptions and their fate became miserable. They were transferred to uncongenial places and their promotion was stopped. There were many such cases of injustice and the High Court of Bengal thought it wise and imperative to protest in one case which was brought to its notice. Mr. Atool Chandra Chatterjee was the Sub-divisional Officer of Patuakhali in the district of Barisal. He was an independent and conscientious Magistrate and refused to convict in cases in which there was no convincing evidence. His acquittals, however, brought upon him the displeasure of the Superin-

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27 The *A. B. Patrika* in its issue of 2-3-93 introduced a humorous imaginary dialogue.

Magistrate :—I cannot allow you so many witnesses.

Accused :—But Hoozur, they are essential to prove my innocence.

Magistrate :—You must select two out of the ten you have cited.

Accused :—The two can testify to only one point of my case.

Magistrate :—Well, I cannot allow you more than three witnesses, and now you must manage with that number.

Again, Government :—How much do you draw as salary per day?

Magistrate :—Twenty rupees.

Government :—How many men have you sent to jail to-day?

Magistrate :—None, your Honour.

Government :—You have then no right to draw the day's pay."

tendent of Police, who drew the attention of the District Magistrate to this matter. This was before the steam-roller of Sir Charles Elliott's policy of no conviction, no promotion was actually put in motion. Hence nothing was done against the Deputy Magistrate without further enquiry. In 1891 when Sir Charles went to visit Barisal, the District Magistrate brought the frequent acquittals by Mr. Chatterjee to his notice. Sir Charles thereupon asked the Divisional Commissioner to visit Patuakhali and report upon the conduct of the Sub-divisional Officer. One year later when Sir Elliott's new policy was in full swing, he would not have taken recourse to this second enquiry by the Divisional Commissioner. On the report of the Superintendent of Police and the District Magistrate, he would have taken action and stopped the promotion of the Deputy Magistrate. But now the Commissioner went over to Patuakhali to investigate into the judicial conduct of Mr. Chatterji. He was dissatisfied, on enquiry, with the Sub-divisional Officer's judicial independence and sent a strong note against him. The Lieutenant-Governor immediately transferred him to Burdwan, a hot-bed of malaria. Mr. Chatterjee also got scent of the fact that he would be debarred from promotion. His case was, however, now taken up by the sympathetic District Judge of Barisal, Mr. Stanley. He sent a note to the High Court explaining why Mr. Chatterjee was transferred from Patuakhali and how the stopping of his promotion was under contemplation. Sir Comer Petheram, the Chief Justice, appreciated the gravity of the situation and entered into a correspondence with Sir Charles Elliott. He complained that the Government had interfered with Mr. Chatterjee's judicial discretion and now threatened the stopping of his promotion so that his example might be an eye-opener to other Magistrates. The Lieutenant-Governor, however, did not take the protest of the Chief Justice seriously and persisted in his course. The High Court then moved the Government of India and the Secretary of State. After all this noise, Sir Charles could not debar Mr. Chatterjee from

promotion.[28] He had to eat, this time, the humble pie. But discomfited here, he applied his principle of no conviction, no promotion ruthlessly to other cases, promoting and advancing those who would convict blind-fold and passing over those unfortunate officers who still responded to the little voice within and could not on that score keep pace with his fast policy. The administration of justice in the years following thus became a farce and a mockery. The Amrita Bazar Patrika, the only daily nationalist Paper in Bengal of those days and edited by that redoubtable champion of the popular cause, Mr. Sisir Kumar Ghose, now took up its cudgels against the policy of Sir Charles Elliott. Mr. Ghose was a witty and pungent writer. He now devoted his skill in a series of articles against the demoralising atmosphere which the Lieutenant-Governor had created in the judicial field. He brought home to the public and also to the Government all the implications of the policy that was being pursued. The serious nature of the danger that threatened the interests of the people was explained almost from day to day in a clear, lucid, catchy way. This exposure of the shameful policy in the columns of a most popular newspaper created soon a public opinion against the Government.[29] It had also its effect to some extent. The percentage system was relaxed to an appreciable degree. The principle of no conviction, no promotion was not of course killed, it was only scotched, and every now and then it was found to raise its head. We have seen already how Mr. Westmacott, the Commissioner of the Presidency Division, drew the attention of the District Officer of Nadia, in 1896 to the too many acquittals indulged in by some Magistrates. Mr. Garrett, the District Magistrate of Nadia, on receipt of this letter from the Commissioner, sent for Mr. Jogendra Nath Bannerjee, a Deputy Magistrate and

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28 *A. B. Patrika* for 19-5-93.

29 In the issues of 15-2-93, 16-2-93, 28-2-93, 2-3-93, 17-5-93, the leading article was titled "No conviction, no promotion." See also the issue of 30-10-93.

took him to task for his acquittals. He threatened him with his serious displeasure in case he did not show better results in the future. But Mr. Bannerjee's conscience was not so oily and he could not send to prison men against whom there was no convincing evidence. The District Magistrate hence reported against him to the Lieutenant-Governor and Mr. Bannerjee was at once transferred elsewhere by way of a punishment.[30]

The subordinate Magistrates are thus completely under the thumb of the District Officer and the Government. If they show any independence and act up only to the merits of the case and the dictates of their own reason and conscience, their future is sealed. They are sure to be passed over and even degraded to a lower position. If on the contrary they allow themselves to be pliable instruments in the hands of the executive, their gradual promotion is assured. Naturally under these circumstances, there can be no justice in the political cases in which the Government are vitally interested. As soon a case has a political colour about it, the Magistrate is on his guard. He requires no 'chit' from the District Magistrate or any general injunction from the Government as to what conclusion he should come to in such cases. He knows quite all right what the Government expect of him. Evidences may be good, bad or indifferent but the conviction of the accused is certain. If the charges are serious, then of course the Magistrate would be relieved to some extent. He would commit the accused to the Sessions. Even if the evidences are meagre and insufficient, he would not still take the responsibility of releasing the accused on his own shoulders. He would commit them to the Sessions where they would now take their chance. During the days of the Partition agitation in Bengal, the Magistrates seldom dared to acquit any person accused of a political offence. "It is a remarkable fact," wrote the Amrita Bazar Patrika, "that Indians accused of complicity in Swadeshi cases have not escaped conviction, imprisonment or fine, except in one or two insignificant

30 *Ibid* for 4-9-96 and 4-10-96.

cases.''[31] Those were the days of the boycott of British goods and the promotion of indigenous articles. This movement roused the violent antipathy of the Government and the fiat went forth that the boycott must be crushed at any cost. The Magistrates naturally were on the alert ; any case which smacked of swadeshi must be disposed of with a conviction, evidence or no evidence. In 1907, a Chowkidar of the Village Amna in the district of Barisal, informed one day the police that some youngmen of the locality had had a scuffle a week earlier with a few shop-keepers dealing in British goods. It was alleged that these shop-keepers got some injuries as a result of the tussle. The youngmen were put under arrest and sent up for trial which came off before a Deputy Magistrate. It is important to remember that the shop-keepers themselves did not lodge any complaint against the accused. It was the Chowkidar who seven days after the occurrence of the alleged offence informed the police. Besides, when the merchants in question were called in as prosecution witnesses, they deposed in favour of the accused and denied that they were molested any way by them. There was thus not an iota of evidence against the accused. But it was a swadeshi case and how could the Magistrate acquit them? He sentenced them all to rigorous imprisonment for four months. The case on appeal came up before the Sessions Judge of Barisal who in his conversation with the defence lawyer in the court gave vent to his deep-seated prejudice against the Swadeshi workers. But all the same he too could not swallow the sentence of the lower court and released the accused.[32] In political cases, the Magistrates are thus mere gramophones giving expression to their Masters' voice. During the last ten years, there has been a political upheaval in the country and indiscriminate arrests have been made. But the Magistrates have seldom shown courage enough to go against the police and acquit the accused. They have kept on the safe side. They have either committed the accused to the Sessions or sentenced them to certain terms

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31 *A. B. Patrika* for 27-1-06. 32 *Ibid*, 24-6-07.

of imprisonment themselves. They cannot be expected to do otherwise. All the political prosecutions are initiated at the instance of the District Officer or the Provincial Government. The Government being thus directly interested in these cases, the Magistrates have to try them to their entire satisfaction. Like the police, the Magistrates are also an arm of the Government. Like the baton of the Police and the sword of the army, the mace of justice is also an instrument in the hands of the Government. The Magisterial Courts are not to distribute even-handed justice to all but to maintain the fiat and the prestige of the Government. They have accordingly lost all confidence of the people. When a man is hauled up on a political charge before any Magistrate, he never expects any justice. It is hence becoming rare every day that an accused should enter any defence. Whatever the evidence, he knows that his punishment is premeditated. It has been determined when the Police have taken him into custody. The Court of the Magistrate is only the office for registering the decision of the Police. To appoint a counsel and defend oneself against the prosecution does hence amount only to a loss of money and time for nothing. It is an unnecessary luxury which people are discarding now-a-days. That people do not cherish the least confidence in a Magisterial tribunal in political cases, is brought out in a most lucid statement with which Mr. A. V. Thakkar of the Servants of India Society withdrew his defence in the court of a Magistrate at Kaira. That he belonged to the Servants of India Society was itself a guarantee that he was a moderate in political views and opposed to the policy of the Congress. His straightforwardness and honesty of purpose would be testified to by all who knew him. As a social worker, he went over to a place called Mahomedabad to study the situation there. Picketing at this time was going on before the liquor shops of the locality. Once Mr. Thakkar was found there, he too was arrested on a charge of picketing. At first he entered a defence when he was hauled up before the court of the Magistrate at Kaira. He was not a Congress man nor a satyagrahi. He was a Moderate who had not yet been dis-

illusioned as to the justice meted out by the Magisterial Courts. But soon the atmosphere of the Court opened his eyes to the utter unreality of the whole thing. He accordingly withdrew his defence. He had now no hope of getting justice from a Magistrate who belonged to the executive service and as such was under the direct control of, and in perfect sympathy with, the Government who might be interested in his conviction.[33]

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[33] See the *A. B. Patrika* for 7-10-30.

CHAPTER V.

HIGHER COURTS.

The movement for the separation of the two functions has been up till this time concentrated mainly, if not exclusively, upon the Magistracy. That the District and Sub-divisional Officers combine in their hands both judicial and executive functions and that the other Magistrates also are influenced and controlled by the executive have been hitherto the complaint of the people. But the fact that the Sessions Courts are also amenable to executive control has to a great extent eluded their notice. If the Magistracy is completely under the thumb of the executive Government, it must be remembered that the Sessions Courts are only one degree less influenced by that authority. The control is there but in the case of the Sessions Judges it is only not so brazen-faced. The Sessions Judges hold their office during the pleasure of the Government. Their transfer, leave, and promotion are determined by the Provincial Governments. Of course, in these matters, the opinions of the High Courts are consulted and this fact gives the Sessions Judges one degree more freedom than the Magistrates. But all the same the fact remains that the Judges depend upon the Provincial Governments for their leave, transfer, and promotion. They have hence to keep the Government in humour. They cannot freely use their own discretion in cases in which the Government have any stake. They are after all the officers of the Government, and not of the High Court.[1] Sir

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[1] The following conversation was held between Sir John Woodburn, L.-G. of Bengal and Mr. Pennel, the District Judge of Noakhali.

L.-G. :—"The Judicial Officers are my Officers just as much as the executive Officers and I want them to do well.

Mr. Pennel :—What you have been saying to me sounds very much like a threat. Have I your permission to represent the matter to the High Court?

Charles Elliott, during his Lieutenant-Governorship of Bengal, attempted to introduce the principle of no conviction, no promotion even in the case of the Sessions Judges. Unless these Judges also convicted as freely as the Magistrates, the accused sentenced in the lower court, would get off on appeal to the higher tribunal. Sir Charles Elliott reprimanded the Sessions Judges if they did not keep pace with the Magistrates in the lower Courts. Referring to the work of the Sessions Courts in the Patna Division during the year 1892, he remarked that "the percentage of cases in which convictions were obtained was 66.6—a very fair result." But he added "the proportion was worst in Gaya."[2] These observations clearly prove that he wanted a certain percentage of convictions from the Sessions Courts and woe betide the Judge who would show greater respect for the merits of the case than for the percentage system of the Lieutenant-Governor. The Sessions Judge is also not without his fears of the District Officer and the Police. In case he indulges in acquittals offensive to the District Executive, a report goes against him to the Provincial Government. That means a black mark against his name. The Inspector-General of Police may also similarly report against him for his alleged leniency. "As a result, whenever a Sessions Judge has to try a Crown Case he shows, as a rule, a decided predilection for the prosecution." This was the remark of the Amrita Bazar Patrika in 1909,[3] but it was as true of that year in Bengal as it is to-day. As recently as March 1929, Mr. B. K. Bose, a leading member of the Alipur Bar, observed from his seat in the Bengal Legislative Council that the Judges in the Mufassil always "take care to see how the police received their judgments." He further referred to a Sessions Judge belonging to the Indian Civil Service, who lamented in his presence

L.-G. :—No, I am not going to enter into a discussion with the High Court. It is my business to say where my Officers can be most usefully employed. The Judicial Officers are my Officers and not of the High Court." *See* Correspondence relating to the Removal of Mr. A. P. Pennel from the Indian Civil Service, 1902, (Cd. 1031), p. 253.

2 *A B. Patrika* for 17-5-93. 3 For 25-6-09.

the publication of one of his judgments for Sir Charles Tegart might think ill of it.[4] In political cases specially it is very difficult for the Sessions Judges to use their independent discretion. Once a political accused is committed to the Sessions, the Government watch the case with care and anxiety. The presiding Judge feels every moment that the eyes of the Government are fixed upon him, and if he comes to a decision not to the liking of the executive his future prospects may be blighted. He naturally gives up all pretence for impartiality and issues verdicts that may place him in the good graces of the executive Government over him. His primary duty, he thinks, is not to protect the liberty of the individual from the onslaughts of every aggressor, private or public, but to uphold and sanctify the fiat of the executive.

During the days of the Swadeshi movement, the Government of Eastern Bengal and Assam prohibited the singing of the *Bandemataram* song by an executive decree. A band of Gurkha soldiers under the leadership of Captain Lyall was posted in the district town of Barisal to carry out this fiat of Sir Bamfylde Fuller. One day in January in 1906, Lyall heard a sound of *Bandemataram* but could not exactly locate the place from which the sound came. He, however, with some of his Gurkhas entered without any hesitation the office room of a local legal practitioner, named Bidhubhusan, and assaulted him despite his protest that none in his house had cried Bandemataram. He now filed a case against Lyall for trespass and assault. The Joint-Magistrate who heard the case had no hesitation in dismissing it. A criminal motion was now made against the decision of the lower court to the District and Sessions Judge of Barisal. Here also the case fared no better. The following conversation between the Defence Pleader and the Judge throws a flood of light on the latter's attitude.

"Pleader :—We are not aware of any order which entitled Mr. Lyall to trespass into the house of the complainant and

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[4] Bengal Legislative Council Proceedings, Vol. XXXI, No. 3, p. 372.

assault him in the manner alleged. At least there is no such order on record.

Judge:—We all know that the Gurkhas have been brought here to stop the shouting of *Bandemataram* as prohibited by the Government Circular.

Pleader:—The Circular referred to is itself legally open to question.

Judge:—Be that as it may I am bound to hold it legal until and unless it were declared illegal."[5]

So the Sessions Judge would accept any executive order as legal and valid even though it was clearly illegal and unconstitutional. Anything that the executive might do must hence be valid in his eyes. He would not question, far less censure, an executive measure, however high-handed and disruptive of lawful freedom of the individual it might be. When that measure had the authority of the executive behind it, he would take it as binding upon himself. A liberal conception indeed of the function of a Court of Law! The Midnapur conspiracy case of 1908-9 further illustrates how the District and Sessions Judges can give no protection to the people from the tyrannical and high-handed steps which the Executive in India take so often out of a panic. The District Magistrate of Midnapur, Mr. Weston, took seriously the story of a Maulvi that a conspiracy was being hatched in the district to kill him (Mr. Weston) by bomb. Before accepting the story as true and genuine, Mr. Weston should have carefully cross-examined the Maulvi as to the sources of his information. It was proved later on that the Maulvi got the story from a drunkard butcher in the town whose evidence would be regarded as worthless by every sane man. Mr. Weston, however, was so overpowered and his mental balance was so upset at the possibility of his murder that he readily swallowed the story and moved heaven and earth to unravel the conspiracy. The Lieutenant-Governor, the Chief Secretary, the Commissioner of the Burdwan Division and the head of the Intelligence Branch of

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[5] *A. B. Patrika* for 24-1-06.

the Police vowed their support to Mr. Weston in unearthing the plot against his life. The police investigation guided, supervised, and controlled by the District Magistrate himself, went on throughout the district. A panic was created and many persons were put under arrest. Of these as many as twenty-eight including the Raja of Narajole and Mr. Upendra Nath Maity, the two premier citizens of Midnapur, were committed to the Sessions. They applied for bail but the District and Sessions Judge, knowing full well the interest which all the executive Officers, from the Lieutenant-Governor downwards, were taking in the case, dared not face the responsibility of granting it. So the accused, against many of whom there was not an iota of evidence continued to rot in the lock-up. They carried the matter to the High Court and the petition for bail was heard by the Vacation Bench consisting of Mr. Justice Saradacharan Mitter and Mr. Justice Coxe. Mr. Mitter was surprised that the petitioners had been allowed by the Sessions Judge to rot so long in the lock-up. The two Judges of course differed in their opinion but Mr. Mitter being senior, the release of the accused on bail was ordered. The Government now deputed the Advocate-General, Mr. S. P. (later Lord) Sinha, to conduct the prosecution before the Sessions Court. He found on his arrival at Midnapur that there was really no evidence of any valid character against twenty-four of the accused though the Sessions Judge looked upon their case as so serious that he refused to grant them bail. On the advice of the Advocate-General, the case against these twenty-four was now withdrawn and the same Sessions Judge let them go. Against the remaining three, the case continued. It could not be said that the evidences against them also were any way conclusive. The Advocate-General possibly did not advise their release simply for fear of reducing the prosecuting executive into a laughing stock. As, however, the case against these three was not withdrawn, the Sessions Judge thought it wise to satisfy the Government by awarding condign punishment to them. He disagreed with the assessors and sentenced two of the three accused to rigorous imprisonment for ten

years and one for seven years. An appeal was filed against these sentences with the criminal Bench of the High Court. It was heard by the Chief Justice, Sir Lawrence Jenkins, and Mr. Justice Mookerjee. They accepted the appeal and set aside the decision of the Sessions Judge. The evidences on the strength of which the accused had been sentenced to such long terms of imprisonment were worthless in the eyes of the Justices constituting the Bench. They accordingly set the accused at liberty. The great conspiracy case in which the executive officers had shown so much vigour and zeal, and in which the Sessions Judge had played a second fiddle to the District Officer and his superiors, thus ended in a fiasco.[6] The Sessions Judge of Midnapur had, of course, his defence for refusing bail to so many innocent and respectable men and sending three of them to prison for so many years. The case of Judge Pennel was certainly green in his memory. In 1899, when the Chupra case was taken up in appeal by Mr. Pennel, the District and Sessions Judge, all the executive officers including Mr. Bourdillon, the Commissioner of the Patna Division, were found to be interested in it. Mr. Bourdillon actually requested him to take up the executive view of the case and hush it up.[7] He, however, refused to sacrifice his judicial independence and lend his ears to the exigencies of executive administration. He issued a slashing judgment by which the Constable Narsingh Singh was delivered out of the clutches of the police. The failure of the case was taken as a blow to the prestige of the administration and an insult to the executive officers who had taken an interest in the case. Would the head of the executive upon whose pleasure depended the future prospects of Mr. Pennel now forgive him? Of course, he would not. Sir John Woodburn, the Lieutenant-Governor of Bengal did not allow grass to grow under his feet. Immediately after the delivery of the judgment, Mr. Pennel got the

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6 *A. B. Patrika* for 13-5-09, 2-6-09, 3-6-09.

7 Correspondence relating to the removal of A. P. Pennel (Cd. 1031), p. 250.

order of his transfer, practically to a penal station. Chupra was one of the healthiest of the districts in the old province of Bengal, while Noakhali whither Mr. Pennel had now to hasten was notorious for its unhealthiness.[8] This does not end the story of Mr. Pennel's punishment for his assertion of independence. Two years later, as the District Judge of Noakhali, he delivered a judgmet in which he made some indiscreet and unfortunate remarks. For committing such indiscretion, any other member of the Indian Civil Service would have at most been debarred from promotion for some time or temporarily degraded to a lower post. But in the case of Pennel who had made himself obnoxious for his independence, the Governments of Bengal and of India recommended his dismissal without even any compassionate pension. The Secretary of State acted up to this vindictive recommendation and Mr. Pennel was dismissed the Service. Such was the nemesis for the sins of independence and how could the Sessions Judge of Midnapur forget it? The case before him was almost a parallel one, only it was of greater importance and seriousness. As in the Chupra case, here also the whole hierarchy of executive officers from the Lieutenant-Governor to the District Officer was vitally interested in the progress of the case. Naturally he would not do anything which might prove that he was not taking the executive view of the case.

Besides the control which the Government exercise over the conditions of the service of the Judges, there are other factors also which enter into the executive bias of the judiciary. It must be remembered that most of the Sessions Judges are recruited from the Indian Civil Service, which has been the governing service in India since the days of Lord Cornwallis. It has not really been a service at all. The Indian Civil Service has been in fact a corporation entrusted with the government of this country. The members of this great trust have constituted the *Corps de'lite* of the Indian bureaucracy. They have helped the formulation of the general policy of the

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8 *Ibid*, p. 250.

Government and have been responsible for supervising the execution of that policy. They have headed the different departments of public administration in the country. They have led the police, they have guided the public utility concerns, they have sat also on the judicial bench. The *espirit de corps* among them has been remarkable. In their dealings with the people outside their circle, they have been noted for their haughty exclusiveness, but among themselves they have developed a peculiar camaraderie of spirit. Perhaps their exclusiveness as to the outer world has drawn them all the more closely to themselves and turned their association into a brotherhood. Wherever they may be and however different may be the nature of their duties, they are still tied together by the bonds of this brotherhood. They are all of them members of the great trust and are only fulfilling in their different capacities the supreme object of this governing corporation—the maintenance of British rule in India. The I. C. S. Sessions Judge is hence automatically drawn to the District Executive Officers belonging to the same service. Their functions may be different, even antagonistic but they are alike members of the "Heaven-born Service." They look upon themselves as illustrating the principle of God fulfilling Himself in many ways. They may be working in different departments, they may be moving in different spheres, but they are working all the same for the fulfilment of the fundamental objective of the great corporation. In cases, therefore, which affect any way the interests of the Government, the Civilian Judge and the Civilian District Magistrate have no differences. They as a rule see eye to eye. As members of the same brotherhood, they look at such cases from the same angle of vision. The District and Sessions Judge thus constitutes, in important and vital questions, no check upon the vagaries of the District Officer. They are birds of the same feather and seldom fail to flock together.

The very fact that the Judges belong to the Indian Civil Service has itself no doubt inculcated in them an executive bias and perspective. But some conditions of their service have

further aggravated this evil. Up to the year 1873, judicial duties were not looked upon as requiring any specialised skill. They were not regarded as any way different from the other duties of public administration. Hence officers who could discharge police duties to-day or revenue functions to-morrow, might easily occupy the judicial bench the day after. Nor once selected for the bench, would they remain there permanently. Some time later they might be invested with a superior executive office. Thus during the period, 1838 to 1859, a civilian after working for some years as an Assistant and Joint Magistrate would be promoted to be a District Officer. In this capacity, he would be in charge of the district police and magistracy. His next turn of promotion would make him the chief revenue officer of a District. After some years when his next promotion would be due, he would be asked to quit the revenue department and take to judicial duties as District and Sessions Judge. From this office, he would next move, if his ability was recognised, to be the Commissioner of a Division. If he were really an effcient man, and the Government thought him worthy of further promotion, he would revert after some years to judicial duties as a Judge of the Sudder Court.[9] In 1859, the offices of the Collector and the District Magistrate were amalgamated. To this extent, there was a break in the line of promotion sketched above. Otherwise it remained in tact up to 1873.

Now a Sessions Judge who had just discharged the duties of an executive District Officer with enthusiasm and vigour and who looked forward to his promotion to a superior executive post in the near future, could not certainly have developed all on a sudden a judicial temper, balance and fairness. It would not be possible for him to live down his executive bias, and look at things except from an executive angle of vision. As a District Officer, he had been accustomed to take orders from the Government and serve their interests to the best of

9 Parliamentary Papers, Vol. 59 of 1857, p. 289.

his ability. Promoted to the District Bench, he would not be able to shake off easily the habit thus incurred. Nor would he at all try to do so even if he could when there was soon a chance of his getting the Commissionership of a Division. In his judicial capacity, he would continue to grind the Government axe and exalt the Government prestige.

In 1873, Sir George Campbell, the Lieutenant-Governor of Bengal, divided the Indian Civil Service into two branches and instituted what is known as the parallel promotion system.[10] Henceforward the Civilians after twelve years of their service were to elect a career. They might choose the executive branch and hold henceforth only executive posts, or they might take to the judicial branch and expect their promotion only in the judicial line. The choice was not to be absolutely voluntary. Both the desires of the officers and the exigencies of the administration would be taken into consideration before asking them to join one or the other branch. The system thus inaugurated in 1873 has continued till this day. Under this arrangement officers have not to move like a shuttle-cock between judicial and executive appointments. They take to one line permanently and discharge one kind of duties throughout. This choice of a permanent career has given the judicial officers an opportunity, limited of course by the general environments of the Indian Civil Service, to live and move in a judicial atmosphere and develop to some extent a judicial temper.

Of course during the first twelve years of their service, the officers have, as usual, to move rapidly between executive and judicial appointments. Nor are their positions any the less responsible during this period. After putting in about five to six years' work as an Assistant Magistrate and as a Subdivisional Officer, a Civilian now-a-days may be promoted to be an officiating District Officer. After working for two or three years in this capacity, he may be transferred to act as an Additional District and Sessions Judge. As a District

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10 Report on the Administration of Bengal, 1872-73, p. 4.

Officer for some time and as Sub-divisional Officer before this, this gentleman has already acquired certain prejudices and has learnt to regard certain classes of men as his opponents. He has acquired also a good experience as to the general attitude of the Government towards men and things. Presiding over a Sessions Court, it is impossible for him now to live down these prejudices and try the Crown cases with an open mind and sure impartiality. He knows already what the Government expect of him. Accustomed for the last several years to obey the Government he cannot all at once muster sufficient courage and independence to try these cases only on their own merits. Nor is it in his interest to show such independence. It is common knowledge that most of the Civilians desire an executive career. The judicial branch is certainly unpopular among them. Work here is monotonous while on the executive side it is varied and interesting. Besides, the executive line affords more prizes and more openings for distinction than the judicial branch. An officiating Sessions Judge who has acted for some time as a District Magistrate not unnaturally therefore wants to go back to his former job. It is not enough, to this end, that he should have his inclination to the exectuive branch known to the Government. He must also keep the Governmet in humour and prove to their satisfaction that he can pull on well with the police. In other words, he must give up, as Sessions Judge, any pretension to independence in cases which affect the interests of the administration. Some I. C. S. Officers again are promoted straight from a Sub-divisional Officership to the post of a Sessions Judge. They also are as a rule no less cringing to the Government than their Colleagues who have acted for some time as a District Officer. Like most men in their Service, they too prefer an executive career, and while acting as Judges they do their best to move to the executive branch. They have hence to walk a wary path and act with caution and trepidation in Crown cases. No doubt they have not the disadvantages of having acted once as a District Officer. But they have already acquired some executive prejudices and bias in

the capacity of a Sub-divisional Officer. Besides accustomed, as an Assistant Magistrate and a Sub-divisional Officer, to obey implicitly the mandate of the District and Divisional Officers, they cannot, when promoted to the office of a Sessions Judge, develop within a short time an independent attitude towards them. A young officer may be asked to officiate as a Sessions Judge in a district under the Executive Officer of which he might have served as a Sub-divisional Officer not a long time ago. He cannot in such a situation, assert the independence befitting his position. He remains still to a considerable degree under the influence of the District Executive. Now-a-days a Sub-divisional Officer is not as a rule promoted to be a Sessions Judge in the same district. He is generally posted in this capacity in another district, neighbouring or distant. In former days, however, a man who had acted as a Joint Magistrate in one district might and very often did, become the officiating Sessions Judge of that district. This would make the evil uglier still. The case of Mr. Provat Chandra Nag in Comilla has already been referred to in another connection. We have seen that his case came up at first for trial before the Joint Magistrate Mr. G. But by the time the Deputy Magistrate Mr. R. sentenced him to two weeks' imprisonment with hard labour, and a fine of Rs. 200/- under instructions from the District Officer, Mr. G. had become the officiating District and Sessions Judge of Comilla. He had, as Joint Magistrate, been under the control and influence of the District Officer whose enmity Nag had somehow incurred. Now as Sessions Judge he could not shake off his spirit of deference towards him. When Provat Chandra Nag appealed to him against the sentence of the lower court and applied for bail, he took up an attitude which convinced the accused that he could expect no justice at his hands. The Sessions Judge passed the order that Nag might be released only on a bail of Rs. 10,000/-. It was an extraordinary demand in view of the most ordinary character of the case. The High Court was then moved and the appeal was transferred to the court of the Sessions Judge of Dacca who had no hesitation in quashing

the sentence of the lower court at once.[11] Many of the Sessions Judges who are junior members of the Indian Civil Service thus still suffer from the evils and drawbacks which necessitated the bifurcation of the Service in two distinct branches in 1873. They do not enjoy the advantages of the division. They still belong to the combined corps and uncertain as to their future cannot evince properly any judicial independence and fairness.

Even after twelve or thirteen years of service when some officers are transferred permanently to the judicial branch, they still entertain certain extra-judicial ambition and discharge now and again some extra-judicial work which may interfere with their judicial impartiality. In the Bengal Civil List, we come across the name of an officer recruited in 1904 and confirmed in the grade of District and Sessions Judges in 1917. Later on, however, he was allowed to become the Chairman of the Calcutta Improvement Trust and subsequently to become the Secretary to the Government of India, Commerce Department.[12] For a permanent District and Sessions Judge to become the Chairman of the Improvement Trust and Secretary to the Commerce Department is an administrative anomaly hardly to be desired. It may be an exception made in the case of only one gentleman. But still it is something to be condemned. There are other Secretaryships and Deputy Secretaryships both in the Government of India and in the Provincial Governments which go as a rule to the permanent District and Sessions Judges. The Secretary and the Deputy Secretary to the Government of India, Legislative Department, are recruited from the I. C. S. Officers belonging to the Judicial branch. Similarly in the Provincial Governments the posts of the Legal Remembrancer and Secretary to the Judicial Department are filled by senior members of the judicial branch of the Indian Civil Service. However technical and legal may be the work in these departments, the District and Sessions

11 *A. B. Patrika* of 22-9-93.

12 The Quarterly Civil List for Bengal, Jan. 1930.

Judges deputed to discharge it are initiated into the inner mysteries of the Government. Once in the Secretariat, they imbibe to a considerable degree an executive spirit and lose to a great extent their judicial balance. Besides, when such posts which are covetable to all Mufassil Judges, are dangled before them they are, as a matter of course, tempted to please the Government by their decisions so that they might get a chance to occupy one such portfolio. For a District and Sessions Judge to covet and fill the post of a Secretary to a Government Department is an unhealthy anomaly to be discouraged by all means.

The Sessions Judges in Indian Districts are thus no less under the thumb of the executive than the Magistracy. Depending upon the Government for their leave, transfer and promotion and also for the continuance of their service, they cannot be expected to assert the independence of the bench. Their judicial discretion they have to throw to the winds, in order to placate the authority on whose favours their future hangs. The Provincial Executive controls their future and controls as such their conscience as well. The fact again that most of the Sessions Judges are recruited from the Indian Civil Service makes it further impossible for the judiciary to become a check upon the action of the executive. As members of the great governing corporation, the executive and judicial officers have very often the same outlook and cherish the same opinions with regard to the cases before them. The Judiciary under these circumstances becomes only a hand-maid to the executive power and the Sessions Judges in Indian Districts, though they do not themselves exercise any police function, are not infrequently responsible for upholding and sanctifying the tyranny of the police.

CHAPTER VI.

HIGHER COURTS (CONTINUED).

The judicial hierarchy is topped in an Indian Province by the High Court. In certain civil cases, of course, an appeal is allowed against the decision of this court to the Judicial Committee of His Majesty's Privy Council. In criminal cases, however, the High Court is the final authority. Generally no appeal against its decision is entertained by the Judicial Committee. A Criminal Bench consisting of two Justices is formed by the Chief Justice of the High Court. It hears all the appeals and motions from the lower Courts in the Districts. It confirms the death sentence which a District and Sessions Judge may have awarded to an accused. It also gives its verdict in cases in which the Sessions Judge may have disagreed with the jury. The High Court as the head of the Criminal judiciary exercises also wide powers of supervision and revision over the lower courts. It may transfer a case from one tribunal to another, it may also on its own initiative call for the records of a case and direct the trying Magistrate to show cause why his decision should not be set aside.

The conditions of service of the High Court Judges are far better than those under which the District Judges have to work. They are appointed by the Crown and hold their office during His Majesty's pleasure.[1] This of course does not apparently give them the same independence as enjoyed by the Judges of the Superior Courts in England or the Federal Tribunals in the U. S. A. The Judges of these English Courts cannot be removed without an address of the two Houses of the Parliament to that effect. Similarly, the Federal Judges of America cannot be deprived of their office without a successful impeachment instituted by the House of Representa-

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[1] Section 102 (1) of the Government of India Act.

tives and heard by the Senate. But the law in the case of the Indian High Court Judges merely lays down that they hold their office during the pleasure of the King-Emperor and may be dismissed by Him. But actually they hold their appointment during good behaviour till the sixtieth year of their life when they are to retire from the bench. In case of a serious misbehaviour on the part of any Justice, he is not to be dismissed by the King-Emperor merely on the advice of the Government of India and the Secretary of State. A competent Commission is to be appointed to institute an enquiry as to his alleged misbehaviour and the Secretary of State is to advise the King-Emperor in the light of the recommendations of this Commission. So the Justices of the High Courts in India enjoy practically as good a security of tenure as their compeers in England and the U. S. A. They do not also, like the Magistrates and the District and Sessions Judges, stand in constant fear of being transferred from one place to another by the Government. They have thus considerable opportunities of impartiality and independence. Without endangering their position they may guard the liberty of the people from the encroachments of the executive. Nor have the High Courts always belied the hopes of the people. The High Court of Fort William has not yet been wholly successful in living down the traditions of fearless independence and complete impartiality laid down by the first Chief Justice, Sir Barnes Peacock. Sir Barnes Peacock was a noted legal luminary of his days. He was equally sensitive as to the independence of the Court over which he presided. Whenever the executive made any attempt to interfere in his affairs, he repulsed it with promptitude and vigour. The Governor-General, Lord Lawrence, who had been a Punjab Civilian and as such believed in the patriarchal form of justice and could not distinguish between the functions of the executive and the judiciary once poked his nose into matters within the jurisdiction of the High Court. Immediately Sir Barnes Peacock was on his guard and before his eagle eyes and stern attitude the Governor-General had to retrace his steps. Lest any frequent social intercourse

with the executive should instil an unconscious bias into his mind he declined all invitations to the Government House which were not strictly of an official character. He even refused to be the member of any club for fear of being closely associated within its precincts with the executive members of the Government. His example was followed by some of his Colleagues on the Bench and three of his successors in the office of the Chief Justice. They withdrew themselves from the Calcutta society dominated by the members of the Government and punctiliously remained aloof from the Government House. They did not allow their independent judicial discretion to be warped any way by the subtle and all-pervading influence of the Executive Government.[2] In this country the executive is so powerful and its influence is so great, that none can withstand it without a constant vigilance on their part. The executive already wields large and wide powers. But it wants to have everything in its own way. No obstacle will it allow to stand against its irresponsible career. It will brook no check on its supreme authority. If the High Court does not fall in with its pretensions and checks its illegal exercise of power, it must see to it that this Court is muzzled and its Justices are somehow brought under its influence. This purpose cannot be achieved by an exhibition of frown, it may be fulfilled by a show of favour or by some other sinister means of which the executive is capable. In subtle, sinister ways, the influence of the executive is brought to bear upon the Judges. Now prevention is better than cure and the Judges should regulate their movements so as to allow the executive no opportunity of exercising any influence upon them. They should avoid the company of the Executive Officers as far as possible.

During the tenure of office of the first four Chief Justices and again during the regime of Sir Lawrence Jenkins, the

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[2] See *A. B. Patrika* for 13-2-06, 24-3-06, the *Statesman* for 18-4-09 and the Bengal Legislative Council Proceedings, Vol. XXXI, No. 3, pp. 365-370.

High Court of Fort William was truly recognised as the palladium of justice. It checked the vagaries of the Mufassil Magistrates and made every attempt to mete out justice to the people in an even-handed manner. It rebuked the Lower Courts for their lapses from the correct procedure and set aside the decisions not warranted by the facts of the cases and the laws of the land. It proved to be thus an excellent mentor for the Mufassil Magistrates and Judges and a sure guardian of the rights and privileges of the people. In its enthusiasm, however, for the correct procedure and the right decision, it became the *bete noire* of the 'strong' District Magistrates who would twist the law in order to punish an obnoxious person. The executive officers everywhere feared the High Court and on that account disliked it also from the bottom of their heart. It was the only curb upon their race for despotism. With the retirement of Sir Comer Petheram in 1896, the High Court Bench of Calcutta lost for years together its old reputation for independence. Sir Francis Maclean, the new Chief Justice, broke away from the traditions of his predecessors and established an entente between the High Court and Belvedere. For over twelve years, the Chief Justice of the High Court met the Lieutenant-Governor of Bengal frequently at the latter's dinner table and through the social intercourse was transmitted to the High Court premises all the influence of the Executive which had been absent so long from that building. The Criminal Bench of the High Court now took its cue from the Lieutenant-Governor and acquitted itself to his satisfaction. Such cordial relations between the High Court and the Bengal Government continued up to March 1909, when Sir Francis Maclean laid down his office as the Chief Justice of Bengal and retired from the bench. It was with supreme regret that the Government of Bengal took leave of Sir Francis. The Lieutenant-Governor, Sir Edward Baker, in a singularly indiscreet speech at the farewell function, expressed the reason of his regret at the retirement of Sir Francis Maclean. "I may be permitted to add," observed Sir Edward, "that during Sir Francis Maclean's term of office even the executive lamb has

learnt to lie down at night with some assurance that it will not be gobbled up by the judicial lion before the morning. And with some experience of past dangers and disasters, I will venture to affirm that that is no small gain to the country and to the public service."[3] The Lieutenant-Governor thus testified to and lauded up the pliancy of Sir Francis Maclean and deplored incidentally the independent attitude taken up by the former Chief Justices of the Calcutta High Court. The sentiments expressed by Sir Edward represented only the rosy executive view. "From the public stand-point, the fraternising of the executive lamb with the judicial lion, indicates an unholy alliance." Even the "Statesman" of Calcutta could not see eye to eye with the head of the Bengal Government in his commedation of the alliance between the Government and the High Court. It pointed out in a leader that throughout the classical period of the English bench up to the death of Cairns, the judges kept aloof from the executive society and lived in comparative seclusion. If this precaution was necessary on their part, it was certainly all the more desirable on the part of the judges out here in India. The more they could be free from social entanglements, the greater would be their opportunities for independence and the more would be the confidence inspired in the people. It was hence "by no means to the true interests of the country that the lion and the lamb of Sir Edward Baker's fable should enter into an impossible partnership."[4]

With the installation of Sir Lawrence Jenkins as the Chief Justice of Bengal, the High Court again returned to its old traditions and rehabilitated its old reputation as the haven of impartial justice and the sure protector of the rights and privileges of the people. At the time Sir Lawrence joined the High Court of Calcutta, the province was passing through the darkest period of judicial subserviency. Face to face with the Swadeshi movement, and the introduction of the cult of bomb, most of the judicial officers in the districts lost their balance and became ready tools in the hands of the panicky and vindictive execu-

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[3] A. B. Patrika for 13-3-09. [4] Statesman for 18-4-09.

tive. It is to the eternal credit of Sir Lawrence Jenkins that his stern and independent attitude made it at least out of the question that the Mufassil Judges should get support and encouragement from the High Court. If he could not repress the enthusiasm of the Magistrates and Judges for punishing heavily any and every man sent up by the police, he could at least set aside the decisions and give back to the innocent men their freedom. After the retirement of Sir Lawrence Jenkins, the Government have made persistent efforts to make the High Court an instrument in their hands. The political movement in the country has thickened and persons alleged to be guilty of political offences have been taken into police custody from day to day. A strictly independent High Court would however, be a thorn on the side of the Government. Sedulously therefore, attempts have been made by the Executive to mollify the attitude of the High Court. The Government want the Judges to be lions but lions under the throne.

We must see now if there is any constitutional remedy for the weakness which the High Court may have shown since the retirement of Sir Lawrence Jenkins. Before, however, suggesting any such remedy, we must study in some details the present constitution of the High Court. It must be remembered that the High Court superseded the Old Supreme Court which had been established in 1774 under the Regulating Act and the Sudder Court which had been the highest Tribunal of the East India Company. In the Supreme Court all the Judges were recruited from practising lawyers in Great Britain by His Majesty and held office during His pleasure. The Judges of the Sudder Court, however, were recruited from the Company's Civil Service in India. In the personnel of the High Court which was instituted in 1861 under the Royal Charter of August 6 of that year, both these elements came to be represented, and under the Government of India Act[5] one third of the Judges whose total number may be twenty at the maximum, must be barristers or members of the Faculty of Advocates of Scotland. Another one third must be recruited

[5] Section 101 (3) and (4).

from the judicial branch of the Indian Civil Service and the third portion is to be recruited from pleaders and vakils and from members of the provincial judicial service.

In the rapid survey I have given of the attitude of the High Court, it will be seen that the Chief Justice holds a position of much responsibility, power and influence. Upon his attitude rests to a great extent whether the High Court will put up an independent front to the Government or become subservient to their wishes. It is he who forms the different benches and if he thinks one Judge on the Criminal bench is not discharging his duties to his satisfaction, he may remove him the next day and give him a place elsewhere. Whether, therefore, the Criminal Bench of the High Court will act independently and impartially or look to the Government for inspiration depends to some degree at least on the relations between the Chief Justice and the Government. Now we have to see if any constitutional amendment of his position is necessary to ensure his complete independence. It must be conceded, of course, that his independence involves various psychological factors over which no external agency may have any control. But it will not do to forget that it is dependent also on some institutional conditions. The Chief Justice under the law must be a barrister or a member of the Faculty of Advocates of Scotland.[6] Like his colleagues he holds his office during the pleasure of His Majesty. This, however, as we have seen, amounts in practice to service during good behaviour and he cannot be removed without a Commission enquiring into any of his alleged offences. So far the conditions are not unfavourable to his assertion of independence. Sir Sankaran Nair in his evidence before the Islington Commission in 1912-13 as a Justice of the Madras High Court pointed out, of course, that no man associated with the Government for a sufficiently long time as a Law Officer should be appointed to the office of the Chief Justice or for the matter of that to any Judgeship.[7] This

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6 Sec. 101 (4) of the Government of India Act.

7 Report of the Royal Commission on the Public Services in India, Vol. II (Cd. 7293), p. 463.

would preclude the Advocate-Generals, the Standing Counsels and other Government Counsels from ever reaching the bench. Sir Sankaran Nair thinks that lawyers associated with the Government in these capacities will be too much saturated with Government views and ideals to discharge their duties properly when promoted to the bench. In England, we find an Attorney-General of yesterday is, with perfect propriety, the Chief Justice of to-day. But England is not India. There the Lord Chancellor may be a member of the Cabinet and without any public scandal be at the same time the head of the judiciary. The circumstances of the two countries differ widely. There the judiciary has long centuries of independence behind it. The deep-seated traditions of impartiality keep the Judges straight in the discharge of their duties. The same public opinion which demands impartiality from the bench also holds the executive to account for anything untoward it may have done. In this country on the other hand, the executive is irresponsible and all-powerful. It does not in the least respond to the demands of public opinion. It does not also let go any opportunity to bring the judiciary into its clutches and make it a ready instrument in its hands. It is not unnatural, therefore, for people to be very cautious as to the selection of the Judges of the Supreme Tribunal. No doubt long association with the Government as their advocates and advisers inculcates, to some extent at least, an executive bias, in the Government Counsels. But it is questionable if it is possible and desirable to divide the practising lawyers into two groups—one working with an ambition to reach the bench and the other to fill the office of the chief law officers and advocates of the Government. The advocates, as a rule, cherish an ambition to sit, some time in their life, on the bench. It is not desirable to shut out certain men from this healthy aspiration simply because they happen to act as legal advisers of the Government. After all, their association with the Government is only legal. They do not participate in formulating the general policy of the Executive Government. Besides to shut out certain able men who have enlisted themselves as Government Counsels is to narrow down

the circle from which the Judges are to be recruited. The Chief Justice should hence continue to be recruited as at present. The system should be modified only to make the "Indian" lawyers also eligible for the post. There is little distinction in training and experience between a barrister-advocate and a vakil-advocate. Nor as Judges have the barristers shown greater independence and efficiency than their colleagues recruited from the vakil bar. The Chief Justice should hence be appointed from the leaders of the bar no matter whether they were called to it in India or England. While this way the field of his recruitment should be widened, it should be restricted in another sense. The office of the Chief Justice should never be filled by the promotion of a Puisne Judge. For ensuring the independence both of the Chief Justice and of the Puisne Judges, such promotion should be constitutionally made impossible. In India so far no hard and fast rule has been observed in the selection of the Chief Justice. On some occasions he has been appointed direct from the bar in England. In some cases we find him recruited from among the eligible Puisnes of the different High Courts. No doubt an efficient and learned Puisne Judge cherishes naturally an ambition of rising to the top and securing the Chief-Justiceship either in his own Court or in any other High Court in the country. The Government also feel tempted to give him a lift and ensure thereby the appointment of a suitable Chief for the highest tribunal in a province. But in the light of other considerations, this healthy and natural ambition of an efficient Judge has to be checked and the temptation of the Government resisted. The simple fact that some Puisnes are eligible for the highest judicial office has been the cause of much mischief. Whenever there has been a chance of a vacancy in the Chief-Justiceship in any province many of the eligible Puisnes in the different High Courts have been on the run for the job. Now canvassing for promotion is an evil in every department of administration, and it is certainly a most dangerous evil in the judiciary and that too in its highest rung. All the wirepulling that has to be made, all the back-stairs influence that has to be summoned interfere with the independ-

ence of the judges. A Puisne Judge who is on the look-out for a higher office is tempted naturally to keep in humour the powers that be. He cannot but respect the wishes and opinions of those who hold in the palm of their hands the strings of patronage. Then again a Puisne Judge who after sedulous attempts has satisfied the executive and secured his promotion to the Chief-Justiceship cannot assert the independence of his position. He is mindful of his obligations to the Government and cannot certainly rise above them. He has the calls of gratitude to answer. And through him, the Government now establish an influence and control over the High Court which instead of being an independent tribunal now turns out to be a tool in the hands of the executive. The present system is thus an evil in both ways. It hampers the independent action of the Puisne Judges. Instead of being the taskmaster of the executive, they are now tempted to act up to its wishes and uphold its action. It also drags the Chief-Justice from behind and prevents his following an independent and steady course. It will be wise therefore to give the go-by to the present arrangement and always recruit the Chief-Justice direct from the leading men of the bar. This will take away the temptations from across the path of the Puisne Judges and relieve the Chief Justice of all obligations to the Government. This will be hence a proper step towards the independence of the High Court.

In order that the Puisne Judges may be relieved of the control which the Chief Justice has an opportunity to exercise over them, some reform should be made as to the formation of the different Benches. It is now the Chief Justice who forms them from time to time. He would not place on the Criminal Bench any Justice whom he may think too independent. Those only who think in the same way as he are generally allotted to the Criminal Bench. Too much discretion is thus given to the Chief Justice in this matter. If perchance he comes under the influence of the Government, the whole Criminal Bench also comes under the same control. It will be hence wise to take away this responsibility from the shoulders of the Chief Justice. Easily the allotment of the Justices to the different Benches may

be made by lot. Generally the Justices in a High Court are not concerned with any special departments. They move from one Bench to another. They sit in judgment upon criminal as upon civil cases. So the principle of lot may not be inappropriate.

Another practice which has made possible, if not inevitable, the exercise of influence by the Government over the High Court, is the recruitment of one-third of the Justices from the Indian Civil Service. We have seen already that the District and Sessions Judges belonging to this Service are impregnated with an executive bias and cannot discharge their judicial duties with impartiality and fairness. It should not be expected therefore, that Justices recruited from these Sessions Judges would all at once turn over a new leaf and become Daniels in their Judgments. The Justices belonging to the Indian Civil Service can never in fact forget that they are members of the great corporation responsible for governing India. An Ethiopian may change his colour but an I. C. S. man whatever his actual calling can never forget that he is a limb of the bureaucratic body that maintains British rule in India. He is first and foremost a member of the Indian Civil Service and only secondarily is he a Justice of the High Court. His first duty therefore is to remain true to the traditions of his Service and if they collide with his function as a Judge of the Supreme Criminal Tribunal, the latter must give way to the former. Even twenty years of judicial experience cannot efface the habit formed and the outlook created during the ten years of their executive life, nor can it by any means shut out the influence which the long traditions of the Indian Civil Service exercise over its members of both the branches. The Judges of the High Court are required to be altogether independent of the Government, they are not to be swayed in the least by the wishes and opinions of the Supreme Executive of the country. The I. C. S. Judges, however, cherish a different relationship with the Government, they are not to be independent of them, they are a limb of the same. The wishes and opinions of the Government are therefore the wishes and opinions of the I. C. S. Justices as well. If hence, the High

Courts are to be raised from the rut and given a position of independence and impartiality, the reservation of one third of the seats for the Indian Civil Service should be discontinued without delay.

Another practice which the Government have encouraged has been responsible for the lowering of the independent tone of the High Courts. When the extra-judicial ambition of the Judges is carefully fostered, an axe is certainly laid at the root of their independence. If they are allowed to expect at the hands of the Government some office more lucrative and more influential than their present job, it is but human that they may like to remain in the good books of the Government and do nothing that may prejudice their interests. A membership of the Executive Council, either of the Viceroy or of a Provincial Governor, has in the eyes of all, a greater glamour about it than the Judgeship of a High Court. It yields greater emoluments and has opportunities of greater power and authority. Now the Government have by certain appointments fostered the impression that from the High Court Bench to the Council table at the Government House is an easy step. Mr. Krisnaswami Iyer was raised from the Bench to the Executive Council of Madras. Sir Abdur Rahim had been a High Court Judge before he became a member of the Government of Bengal. Sir C. Sankaran Iyer was similarly recruited to the Viceroy's Executive Council from the High Court Bench. The late Sir Sams-Ul-Huda was also promoted from the Bench of Fort William to the Executive Council of Bengal. Sir B. K. Mallik was also, though temporarily, taken into the Executive Council of Bihar and Orissa soon after his retirement from the High Court of Patna. In Bengal similarly, temporary vacancies in the Executive Council have been filled by the Justices who have retired from the Bench. Sir Nalini Ranjan Chatterji was the stop-gap between the late Maharaja of Nadia and Sir Pravashchandra Mitter, and Sir B. B. Ghose has recently been appointed to officiate in the place of Sir Pravashchandra Mitter. After these appointments, Justices of the High Courts may naturally think that the supreme execu-

tive offices of the Government are quite within their reach. Unconsciously a desire to remain in the good graces of the Executive Government has grown in them. A spirit of co-operation with the Government is now in the ascendant among the Judges. They seem to be unwilling to place themselves in opposition to the Government that have the strings of patronage in their hands. An unhealthy atmosphere has thus been created. The Judges are expected to be the task-master of the Executive and if they are to discharge their functions carefully and conscientiously they must now and again go against the interests of the Supreme Executive. Sooner therefore the temptations of executive appointments are removed from the path of the Judges, the better for the future of the Indian Judiciary. Once they are raised to the Bench, they must expect no further promotion at the hands of the Executive. This way all incentive to satisfy the Executive Government and remain *persona grata* with them will be removed and the Judges will not be hampered in any way in the exercise of their discretion and independence.

CHAPTER VII.

Arguments against Separation Criticised.

We have traced in some details the evils of the union of the executive and judicial powers in the same hands. We must now appraise the strength and value of the arguments that are trotted out so often in favour of continuing the present system. The first objection that the Government raise to the separation of the two functions is that it would militate against the traditions and genius of the Indian people. It was as early as 1853 that Sir Cecil Beadon enunciated his favourite oriental theory of Government. He tried to bring it home to the Government that in the East people would always appreciate and profit by the concentration of all administrative powers in the hands of a single officer in some district. It was futile and even dangerous to set up different functionaries in one area with separate and independent duties to perform. The enunciation of this view by Sir Cecil impressed the first Lieutenant-Governor of Bengal, Sir Frederick Halliday. He also now gave it out as his experience that the separation of powers was a scheme foreign and unintelligible to Asiatic notions. The Europeans might comprehend and appreciate it but the Indians would be confused and aggrieved by it. Four decades later towards the close of the nineteenth century, Sir Charles Elliott declared the same opinion and pointed out that "the keynote to our success in Indian administration has been the adoption of the oriental view that all powers should be collected into the hands of a single official so that the people of a district should be able to look up to one man in whom the various branches of authority are centred and who is the visible representative of Government." As recently again as 1925, during the debate on this question in the Punjab Legislative Council, the representative of the Provincial Government defended the combination of the judicial and

executive duties in the same functionary on the ground that it "has been in existence in this country from time immemorial." It was an inheritance from the remote past and as such it has certain distinctive advantages. "Institutions are to some extent good in exact proportion to their age. When a man has got used to a particular thing he is able to tolerate it much better than if it were new."[1] Now to classify Governments as oriental and occidental is highly irrational and unscientific. India under the Moghuls was India under absolute despotism. The will of the Monarch was the only constitution of the country. All the powers were concentrated in his hands and in the hands of his agents. But if such concentration of authority was a characteristic of Medieval India, it was no less a feature of Europe before and even after the French Revolution. Long before Louis XIV, France was under an absolutist system of Government and in the time of this great King and his successors the country was under the iron heels of the ruler. The King's wish was the law of the land. All the threads of administration were collected in his hands. Literally, he was the fountain of all authority and the source of all powers. No less stringent was the despotism of the Hohenzollerns in Prussia. They might have been benevolent despots, but absolutist they were all the same. They might have been first servants of the state but nothing could be done without their consent and leadership. All the strings of administration were collected in their hands. Now if France and Prussia could break away from such traditions and take to the "occidental" administrative arrangement, if they could give the go-by to the combination of all powers in single hands, it is not easy to see why India should even in these days of the second quarter of the twentieth century cling to the coat-tails of Medievalism and continue to place executive and judicial powers in the hands of the same functionary. Old institutions have no doubt a claim upon the reverence of the people, but that should not mean that a proved anomaly must not be removed simply because it has a history

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1 Punjab Legislative Council Debates, Vol. VIII, No. 15, p. 726.

behind it. Society everywhere has an organic growth. The east also is not unchanging. Indian social and political conditions have changed and changed in many aspects beyond recognition during the last one hundred years. The so-called oriental theory of Government might have suited the conditions of this country in the later eighteenth and the early nineteenth century. But it is in every way out of accord with the temper of the modern days. The physician must prescribe his medicine in the light of the symptoms of the disease and the physical conditions of the patient. He would be mad or inept if he clings to a prescription simply because it was effective in conditions which have changed. It is again absolutely a false reading of the Indian mind that it cannot comprehend and appreciate the difference between the duties of several public functionaries. Sir Frederick Halliday would have us believe that the Indians would be confused and aggrieved if the same man who put them under arrest did not also try them and send them to prison. This is quite the travesty of the state of things we see. The Indians are specially noted for the subtlety of their intellect. They have been famous for recognising the most minute differences between things which are apparently similar. Even the distant village people can point out with surprising accuracy as to how much power a particular officer possesses. It is high time therefore to shelve the oriental theory of Government and speak no more of traditions and genius of the people.

The second ground on which the Government have opposed the separation of the two powers is that the prestige of the District Officer would suffer in the estimation of the people in case he was deprived of his judicial functions. This argument, we have seen already, was adumbrated by Sir James Stephen. The District Officers are the "mainstay" and "keystone" of the fabric of British Administration in India. They are the eyes and ears of the Government. Their prestige and their authority must hence be maintained at any cost. The exercise of criminal powers, pointed out Sir James Stephen, was the most

distinctive mark of sovereignty. The man who could punish was recognised as the ruler everywhere. Unless, therefore, the District Officer remains invested with criminal jurisdiction, the people in his charge may not fully appreciate his authority. He must have the power to punish otherwise he may not inspire the people with sufficient awe. The representatives of the British Government have no doubt denied now and again that this question of prestige stands in the way of the reform. In 1893, the Secretary of State, Lord Kimberley, definitely pointed out in the House of Lords that the prestige of the District Officers was no valid argument against the separation of the two functions. In 1908, Sir Harvey Adamson observed in the Indian Legislative Council that the union of the two powers in the hands of a District Officer not only did not add to his prestige but actually weakened it to a considerable extent. But two years later in 1910, when Mr. Madge, an official member, again revived the question of prestige and thought it would be undermined by the separation of powers, Sir Harvey of course dissociated the Government from this view but yielded at the same time to the objections raised. Now if we analyse this much talked of prestige, it is found to be something very poor and rickety indeed. An executive power which inspires no respect unless it is coupled with some criminal jurisdiction is certainly hollow and artificial. It means that the people have no regard for, and no attachment to, the District Executive but they are kept under check by the right to punish which has also been given to it. The union of the two powers is hence a clear declaration that the executive as such exercises no influence and inspires no obedience ; its authority is only upheld by the threat of punishment which it may award in its judicial capacity. Under these circumstances, both the executive and the judicial powers suffer considerably. People lose their faith in criminal justice because they know it is abused for upholding executive action. They also cherish no confidence in the executive because they are sure it has no strength and resource of its own. That the people have ceased to place any confidence in the criminal courts is evidenced by the fact that

the political offenders now-a-days enter no defence against the police prosecution. The Magistrate, they think, is there only to sanctify the action of the police, it is hence quite futile to defend oneself against the contention of the prosecution counsel. The executive also, sure that its action would be upheld at any rate by the Magistrate, does not care to be right and honest in the discharge of its duties. It has as a result lost the moral back-bone which alone can evoke the sympathy and confidence of the people. The union of the two incompatible powers has thus instead of adding to the prestige of the executive undermined its strength which can be born only of the people's confidence in it. Sir James Stephen had argued that the union of executive authority with criminal justice was indispensable for the safety of the British Dominion in India. But the result of the union seems to be completely otherwise about. It does not provide for the safety, it is only sapping the foundations of British rule in this country. The union may be intended for inspiring fear among the people. But fear cannot be a permanent deterrent against anything. People would think many times before opposing a District Officer who is noted for his moral integrity and honesty of purpose. But they would easily stand up against the man whose policy is to strike terror by virtue of his dual power of arresting and imprisoning them.

The third argument of the "Unionists" is that the present system does not really militate against the independence of the courts of law. The District Magistrate who is the head of the police seldom tries a criminal case now-a-days. "The District Magistrate who combines in his own person the duties of the thief-catcher, prosecutor and judge," observed the Home Member of the Government of India in 1907, "does not exist in India and has not existed for the past half-century."[2] It is unfortunate that the Government Member made this statement which is at best inaccurate. No doubt the original cases the District Magistrate takes up himself in the older provinces are only few in number. But even in these few cases which he

2 Proceedings of the Legislative Council of India, Vol. XLV, p. 181.

tries the District Magistrate may be interested as the head of the District Executive and as such he may so try and decide them as to grind his executive axe. He may subordinate his judicial powers in these cases to the exigencies of his executive position. Again in the older provinces the number of cases he tries may be few but that is not the case in the so-called Non-Regulation Provinces. There the Deputy Commissioner has himself to try many original criminal cases. Everywhere again the Sub-divisional Officers combine in them both judicial and executive functions. Nor do these officers try cases only now and then. Their judicial duties they have to discharge regularly, most of the political cases specially they have to try. It cannot hence be said with the least accuracy that the combination of police and judicial powers in the same functionary is a feature of by-gone days. It cannot be gainsaid that it is equally a characteristic of to-day. Then as to the evil of the control which the District Magistrate exercises over the Subordinate Magistracy, it also is in the eyes of some no longer potent and dangerous. The Police Commission of 1902-03 minimised the danger to judicial independence from this source. The majority of the Commissioners were of opinion that the subserviency of the Deputy Magistrates had already diminished to a considerable degree and it would disappear altogether in the near future. In the nineteenth century, the subordinate Magistrates, ill-educated as they were, had little sense of the dignity and responsibility of their position and could not as such assert their judicial independence. But by the start of the twentieth century, these Magistrates were being recruited from a highly educated class of the people and they introduced a new tone in their service. All that remained of the old subserviency would also be stamped out, the Commission hoped, in the next few years.[3] But this was too rosy a picture of the situation with which the Commission deluded itself and tried to delude others. It did not in the least agree with the actual facts. In 1908, Sir Harvey Adamson had to admit in his speech in the Indian

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[3] Report of the Indian Police Commission of 1902-3 (Cd. 2478), p. 81.

Legislative Council[4] that "the exercise of control over the subordinate Magistrates by whom the great bulk of criminal cases are tried is the point where the present system is defective." He could not resist the conclusion that "if the control is exercised by the Officer who is responsible for the peace of the District there is the constant danger that the Subordinate Magistracy may be unconsciously guided by other than purely judicial considerations." Here and there there may be high-spirited conscientious Deputy Magistrates who are not ready even at the sacrifice of their future prospects in the Service, to allow their judicial discretion to be warped by the behests of their official superiors. But they are only exceptions which prove the general rule that the Subordinate Magistrates act up, in their judicial capacity, to the orders and desires of their executive Chief. Nor can it be otherwise. However educated and cultured, every officer has an instinctive regard for promotion in his service. He has hence a natural desire to keep satisfied the promoting authority. And as long as the Magistrates have to depend upon the favour of the Chief Police Officer for advancement in their Service, they will have the incentive to gratify his wishes. They will keep him in humour and act up to his behests. Sir Henry Wheeler observed in 1921 in the Bengal Legislative Council that the whole thing was "singularly uncomplimentary to the Subordinate Magistracy."[5] In a similar vein spoke Sir John Maynard in the Punjab Legislative Council in 1925. "A man," he said, "who will depart from the dictates of his own conscience at the bidding of another man will also depart from the dictates of his own conscience at the bidding of a section of the public or his own community."[6] Here the tempter is himself the accuser. You place irresistible temptation in the way of a man and then accuse him of having yielded to the same. The Magistrate

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4 Proceedings of the Legislative Council of India, Vol. XLVI, p. 247-48.

5 Bengal Legislative Council Proceedings, Vol. I—No. 6, p. 270.

6 Punjab Legislative Council Debates, Vol. VIII—No. 15, p. 740.

himself is not here so much to blame for the subserviency he may show. The responsibility for his weakness must be fastened on the system that makes it inevitable. We may not give compliments to the Magistrate for his conduct but it must be admitted at the same time that there is nothing surprising and unnatural in it. To say that he will be subservient to his community simply because he cannot, under the peculiar circumstances, resist the influence of his superior officers is to say the least irrelevant. Such a conclusion does not arise at all. It need only be emphasised that so long as their future prospects are determined by the Executive, the Magistrates will continue to be its slaves and judicial independence will be a misnomer. The examples given in a previous chapter go to illustrate the methods by which the Executive interferes with the normal course of justice. Still the Government never cease to protest that there is no interference with the judiciary. But they really protest too much. Some arguments innocently adduced by the Government Representatives for the maintenance of the *status quo* constitute a decisive testimony to the executive interference with the law courts. When the Bengal Government set their face against the Adamson scheme of separation in 1908-9, one of the arguments they presented was that in the abnormal political situation of the time, the separation of criminal justice would weaken the hands of the District Executive. Similarly in 1928, Sir Geoffrey De Montmorency pointed out in the Punjab Council that in view of the extraordinary wave of crime in the province during these years, he thought it inadvisable to weaken the Executive by taking away from its hands the criminal jurisdiction. This was certainly an open confession that criminal justice was used as a hand-maid to executive authority. Without its co-operation the Government could not meet the situation with expedition and success. In other words with criminal justice in the hands of the Executive, the Government could secure convictions with greater ease and rapidity than in case it were in independent hands. The Government think this to be a valid argument in favour of the continuance of the present system. But in fact it only declares the dangerous character of the combination of

functions that now rests in the hands of the District Executive. It is thus a potent argument not in favour of but against the continuance of the present arrangement.

The financial bogey has also been raised by the Government to ward off the reform which they cannot challenge quite effectively otherwise. Whenever in debates on the merits of this question the Government members have been cornered, they have taken shelter under the wing of finance. It was in 1893 that this financial argument was for the first time introduced to explain the unwillingness of the Government to undertake the reform. The Secretary of State for India, Lord Kimberley, gave it out in the House of Lords that he appreciated the evil of combining criminal justice with executive authority. But the separation of the duties would involve a heavy expenditure which the existing financial position of India would be unable to meet. But it was soon proved that finance was not a serious impediment in the way of the reform demanded, it was only a cover. Mr. R. C. Dutt published in the course of the year a scheme of separation that would put very little strain on the public purse. If the Government were serious about the reform and if they considered finance the only obstacle in its way, they should have welcomed the scheme of Mr. Dutt with open arms. But the Secretary of State did not even look at it. Sir William Wedderburn asked in the House of Commons if the Government would appoint a Commission to examine how far Mr. Dutt was accurate in his estimates. But the Secretary of State had been advised already that no scheme could be put in operation without a large addition to the public expenditure. It was not till this scheme of Mr. Dutt was appended seven years later to the great Memorial presented by Lord Hobhouse and others that the Government thought it necessary to pay their tardy attention to it. During the last thirty years whenever there has been a debate—and debates have been many—one of the principal arguments against the separation has been the lack of funds. Even when the budget of a province was a surplus one and the non-official Members of the Council pressed for utilising this money for this purpose, the Government

members all on a sudden became the champion for the extension of nation-building work and waxed eloquent for economy in other departments. This was certainly a strange language in the mouth of the Government, and it sounded strange to all that heard it. The Government in every province would again magnify the expenses which the reform would entail. An expert Committee of their own choice may, after due enquiry, come to some conclusions as to the capital and recurring expenditure necessary for the reform. But if they do not agree with the preconceived ideas of the Government, they would be turned down as incomplete. The Greaves Committee which formulated the scheme of separation for Bengal in 1921-22 estimated the total recurring expenditure for the reform to be Rs. 4,48,650 and the non-recurring cost to be only Rs. 1,53,000. The Government of Bengal, however, would not accept these figures as the correct estimate of the new expenditure necessary. Sir Hugh Stephenson practically attached no importance to the Committee appointed by the Government and consisting of some highly experienced experts. In the Punjab, the LeRossignol Committee estimated that the total recurring charges would be Rs. 8,21,976 annually and the non-recurring cost would be Rs. 5,89,860. The Bihar Committee which was presided over by Justice Sir B. K. Mallik came to the conclusion that the recurring cost entailed by the reform would be Rs. 1,90,656 while the capital expenditure would be Rs. 5,96,000. The conclusions of the expert Committees have thus nowhere justified the alarming prognostications of the Government. Of course the estimate of these bodies is only approximate and we may take it that the scheme, when in operation, may entail some greater expenditure. But any way nowhere the complete separation of the two functions would involve an outlay of more than ten lacs a year. In some provinces it would be far less. Now if the Government have the mind, they can easily find this amount to carry out so much-needed a reform. During the last fifteen to twenty years the Government have, in the teeth of consistent public opposition, increased by many lacs the police expenditure. They have added also considerably to the expenses under different other items of General Admini-

stration. When so much money could be found for these departments, we do not quite see why the small amount necessary for separating criminal justice from executive control cannot be found by the Government. The financial difficulty, if it is not a ruse, can easily be met.

CHAPTER VIII

LINES OF SEPARATION SUGGESTED.

After recounting the evils of the existing system and meeting the arguments against its immediate replacement, we must now proceed to enunciate the principles on the basis of which the separation of executive and judicial functions should be effected. Since the publication in 1893 of the plan of separation by R. C. Dutt, many attempts have been made to work out a detailed scheme for the complete bifurcation of the two powers. Mr. C. W. Bolton, Chief Secretary to the Government of Bengal, put forward his scheme in 1900. Some eight years later, Sir Harvey Adamson, Home Member of the Government of India formulated a new plan for effecting the separation. In 1913, Sir (then Mr.) Pravashchandra Mitter published a detailed scheme of his own. After the inauguration of the Reforms in 1919, the Provincial Legislative Councils took up the matter and in four provinces, expert Committees were set up which took a considerable evidence on the subject and each put forward its own scheme for separating the criminal justice from executive control.

The bulk of criminal justice is administered by Deputy Magistrates, tho officers of the Provincial Civil Service. A portion of it only is discharged by the I.C.S. men. Now the Deputy Magistrates combine in them both executive and judicial functions and are amenable to the control of the Executive Chief of the district. They are recruited by the Provincial Government, and can be suspended and dismissed by the same authority. If the separation of judicial and executive functions is to be complete and if the criminal courts are to be, in every sense, independent of Government control, the Provincial Executive Service should be debarred from Magisterial duties. Mr. R. C. Dutt in his scheme thought it sufficient that a Deputy Magistrate while discharging judicial duties should be exclu-

sively concerned with them alone and should for the time being pass under the control and supervision of the District Judge. He should not, during this period, take up any executive duty and come any way under the control of the District Officer. But at a later date he might revert to executive work and as such become a subordinate of the District Executive Officer. This scheme is, on the face of it, defective and unscientific. An officer who alternately performs executive and judicial duties, may, very naturally if not inevitably, develop an executive bias which will detract from the merits of his judicial work. Again if he comes at intervals under the control of the Executive Chief, he will not, even while dispensing criminal justice, be able to resist executive influence. The recent schemes have considerably made good this defect of the plan of the late Mr. Dutt. It is now admitted that those who will be in charge of criminal judicial duties must not be given ever afterwards any executive function. They must have their career now limited to the judicial line. There are some of course who advocate that for the first five or six years of the service all the officers should alternately perform executive and judicial duties. At the end of this period, like the members of the Indian Civil Service, they will be given the right to select the executive or the judicial line. Henceforward there will be no interchange of duties. Those who will select the judicial line will continue in that branch. This was the scheme of Sir Harvey Adamson and it has been supported by the minority of the Bengal Committee[1] and the majority of the Bihar and Orissa Committee of experts. They argue that this way the officers will gain a wider experience which will be beneficial to both branches. "We think it essential," points out the Bihar and Orissa Committee, "that the executive and judicial services should each have the experience of the work of the other. A judicial officer is handicapped if he knows nothing of the important branches which the Collector controls. . . . On the other hand the executive has many judicial duties to

1 The Report, p. 6.

perform."[2] "We suggest therefore," continues the Committee, "that there should be one system of recruitment and one combined service for judicial and executive officers up to a certain point."[3] This scheme is no doubt an improvement upon the plan of the late Mr. Dutt, but it is still inconsistent with the principle of complete separation of the powers. In the first place as to recruitment, one method cannot apply to both the branches. The executive officers have to be recruited on the basis of their general education and outlook. It will be unwise to demand of them any specialised knowledge. Those, however, who will be required to perform judicial duties, must have a comprehensive legal training. To the executive officers the knowledge of law, if necessary, is only of secondary importance, and it can be picked up at the time of departmental examinations or as exigencies arise. Law is, however, the life-breath of the judges. Thorough and scientific knowledge of law is of primary importance to them. Nor is merely the theoretical knowledge of legal principles enough. They must have some years' practice at the bar to get accustomed to legal procedure and the atmosphere of the law courts. Experience of some executive departments may to some extent broaden the outlook of the future judge. But a sufficiently long practice at the bar no less develops in him an insight into human nature and a knowledge of men and things. Besides, it gives him a valuable experience of the happenings behind the scenes. The law courts are themselves a training ground. Here they move in a legal atmosphere and come into touch with diverse people and various objects of study. A judge recruited from the lawyers of some experience hence enjoys many advantages from the absence of which his colleague who has never before his promotion to the bench, been inside a law court, must suffer. The methods of recruitment cannot, we may see at once, be the same for the criminal judge and the executive officer. Nor is the experience of the one of the other's departmental business any way necessary and beneficial. As for

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2 The Report, Vol. I, p. 18. 3 *Ibid*, p. 17.

the judge, it is rather detrimental to the quality of his work. If he moves in an executive atmosphere for some years and accepts the executive officers as his colleagues and superiors, he is sure to acquire some executive prejudice which dies hard. We may, therefore, wholeheartedly accept the note of dissent in the Report of the Bihar and Orissa Committee by Rai Bahadur Dwaraka Nath. "The scheme of a combined service," he says,[4] "does not commend itself to me. It offends to my mind against the principle of the complete separation of the Executive and Judicial functions." The Magistrates should on no account belong to the same corps as the executive officers. They may be amalgamated with the Munsiffs and the two together may constitute a separate judicial Service. The Deputy Magistrates already in service should be asked to decide as to which line they will take up. They may prefer executive duties and remain in the executive line or they may choose a judicial career. In the latter case, their names should be withdrawn from the executive list and embodied in the proper place of the new judicial cadre. All the members of this combined judicial service may engage in both civil and criminal cases either simultaneously or at different times. In places, where there are at present two Munsiffs to dispense civil justice and two Deputy Magistrates to try criminal cases, there may not be enough criminal and civil work to keep the two pairs fully engaged. But simply because civil and criminal justice constitute two separate departments, four men are required. But in case a Munsiff may take up some criminal work and the criminal judge some civil work three men may satisfactorily perform these duties. Then again, some subordinate judges who have all along their official life administered civil justice are entrusted to-day with the powers of an Assistant Sessions Judge and are in some cases promoted to be the District and Sessions Judge as well. If they have had experience of trying criminal cases they will be able to discharge their duties of the Sessions with greater confidence and efficiency than at present.

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[4] The Report, p. 29.

Sir Hugh Stephenson tried to prove in a speech in the Legislative Council of Bengal that civil and criminal justice are of different species. They require also different training on the part of those who administer them.[5] But this statement is unsubstantiated by any valid argument or fact. The District and Sessions Judges and some of their assistants and subordinates everywhere perform both civil and criminal functions and nowhere there has been any complaint that they are ill-matched in the same hands. There have been complaints no doubt that the I.C.S. Sessions Judges do not fulfil their civil duties with efficiency. But that is not because they exercise at the same time criminal powers but because they have had no legal training and no experience of civil cases. The late Justice Sir Narayan Chandravarkar in his evidence before the Islington Commission pointed out that during the famine when the executive officers were on famine duty in the Bombay Presidency the subordinate Judges were temporarily invested with criminal powers and they exercised them with exemplary promptitude and efficiency.[6] Mr. Justice Jwala Prasad had also had the same experience. In his written evidence to the Mallik Committee, he observed "to my mind, there must be the same standard of training both for the civil and criminal officers, before they enter service. The two branches of civil and criminal law are inter-woven and it is impossible in the beginning to make any hard and fast distinction between them. . .. It is also impossible to make out a particular lawyer as a civil or a criminal lawyer and to divide the service into civil and criminal officers. The two must be combined together and a judicial officer must try both kinds of cases."[7] The Munsiffs and the Magistrates should hence be combined in the same cadre and discharge both the criminal and civil duties. In case a Public Service Commission is started in every province, the appointments of these judicial officers may be vested in that

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5 Bengal Legislative Council Proceedings, Vol. XI—No. 5, p. 51.
6 The Report, Volume VI, (Cd. 7579), p. 298.
7 The Report, Vol. II, p. 36.

body. Otherwise they should be recruited as the Munsiffs are at present, by the High Court. All powers of transfer, promotion, reduction and dismissal should also be vested in this latter body. The Executive Government should be rigidly excluded from any authority over the members of the combined judicial service. In the first place they will have no executive functions in the discharge of which they may have to come under the control of any executive officer. Throughout their official career their duties will be confined within the judicial field. They will be concerned only with the administration of justice, civil and criminal. Immunity from executive control to this extent is not, however, enough. In the Presidency Towns, Calcutta, Madras and Bombay, the Police Magistrates are not immediately under the control of any executive officer. Nor have they themselves any executive duty to perform. So far as these Towns are concerned, the principle of judicial and executive separation has been observed. The Presidency Magistrates are supposed to be independent of all executive control. There is no District Officer here who is also the head of the Magistracy. The Chief Presidency Magistrate is purely and exclusively a judicial officer. Nor has the Commissioner of Police any legal authority over the Magistracy of the Presidency Town. But all the same we find these courts do not inspire any public confidence. The reason for it is not far to seek. These Magistrates like the Magistrates in the Districts are appointed by the Executive Government. They may be promoted, reduced and even dismissed by the same authority. They are liable also to be transferred in case they are not in the good books of the Government. They are again members of either the Indian Civil Service or the Provincial Service (Executive). And as such they are expected to have some executive bias of their own. Any way they are under the control of the Provincial Executive Government and they must keep this authority in humour otherwise their future prospects may be blighted. If a Magistrate in a District or Sub-divisional town dismisses too often the police cases or fail to take the same view as the police with regard to an important case, the

Superintendent of Police will immediately lodge a complaint to the District Magistrate against the trying Magistrate and the former will see to it that the latter behaves well in the future. In the Presidency Town, similarly, the Magistrates must keep on well with the Commissioner of Police and his underlings. Otherwise complaints will go against them to the Chief Secretary and the Home Member of the Provincial Government who control their official destiny. The Presidency Magistrates are thus no more independent than the Magistrates in the districts. The very fact that their future prospects depend upon the good will of the Executive Government inspires suspicion in the public mind. Recently in the Tilak Procession case of Bombay (August 1930), there was a proposal of calling in the Home Member, Sir Ernest Hotson, as a Court Witness. Sardar Vallabhbhai Patel, one of the accused, thought, however, that it might prove to be embarrassing to the Court to call a witness "who is a superior officer of the Court." Mr. Dastoor, the Chief Presidency Magistrate who was presiding over the Court protested that the Court was not subordinate to the Home Member, it was only under the control of the High Court of Bombay. Sardar Vallabhbhai retorted that this was only in theory ; in practice the Home Member of the Provincial Government was the real superior.[8] When such was the suspicion in the mind of the accused, they did not naturally expect any justice in that tribunal. Their suspicion might be right or wrong but it was there all the same. Steps therefore, should be taken for the radical removal of any suspicion of this kind. It is not enough that the members of the combined judicial service would have no executive duties of their own and would not serve under any executive and police officer. It must also be arranged that they should be immune from all control of the Government. All powers of transfer and promotion and all other disciplinary control over the members of this combined judicial service should be vested in the High Court. The Provincial Government must have nothing to do with them.

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[8] See the *A. B. Patrika*, 10-8-30.

All the District and Sessions Judges and their assistants should be recruited by promotion from the members of the combined judicial service. The promotion as now should be determined by the High Court on the basis of seniority cum efficiency. Any promotion that is not automatic may admit of some evils in the judicial line. But the evils would have been serious only if it were determined by the Executive Government. In the hands of the High Court which would have generally no axe to grind, the principle of promotion is not expected to be misused. Now-a-days the Munsiffs not only become District and Sessions Judges but may also aspire to sit on the High Court Bench, though their promotion to this highest tribunal has only been rare. It would be better to limit the promotion of the new judicial officers to the District and Sessions Judgeships. The wide outlook, thorough and detailed grounding in law and the many-sided experience which the High Court Judges are expected to possess will be sought in vain in the judges of the lower courts. They move always in a circumscribed atmosphere and have seldom handled any complicated and intricate case. It will not be unwise therefore to recruit the Judges of the highest tribunal in a province directly from the bar. Nor will the members of the Judicial Service have any complaint, if they are not raised to the High Court Bench. Beginning as a Munsiff and a criminal Judge with third class powers, they will have opportunity to rise to the position of a District and Sessions Judge. This will be a promotion not in the least mean and negligible. The District Judgeship is practically now-a-days the highest ambition cherished by a Munsiff.

So all the civil and criminal judges in the districts will form a distinct cadre of their own, which will be completely immune from any control of the Executive Government. The members of this cadre will be concerned exclusively with judicial duties and will have no executive and police duties to perform, nor will they be associated any way with an officer who is entrusted with such duties. The High Court Judges will of course be appointed by the Government. But they will

enjoy a tenure of office during good behaviour and will expect no promotion at the hands of the Executive Government. The Chief Justice will not be recruited from among the Puisnes but direct from the bar. And neither while on the bench nor after their retirement, should the Judges expect any other appointment at the hands of the Government. This principle should be observed, if not statutorily, at least by convention.

The Indian Civil Service must cease to have any connection with the judiciary. We have already analysed its position too clearly not to find that its association with the courts of law is detrimental to their independence and impartiality. Whether it is not yet time to dissolve this governing corporation altogether and stop the recruitment of any officer to this Service is beyond the scope of this book to discuss. But it must be emphasised and reiterated that the members of the Indian Civil Service must not be allowed any longer to sit on the bench either in the districts or in the High Courts. The discontinuance of the practice of appointing I.C.S. men to the judicial posts in the districts will release a few lacs of rupees annually in every province. This sum will go a great way to meet the new expenditure necessary for effecting the complete separation of the judicial and executive functions. If again the District and Sub-divisional officers are relieved of their judicial duties, they will have time and opportunity to devote more attention to their executive and police functions. It is to be investigated if under the altered circumstances these officers could not take the responsibility of maintaining law and order without the assistance of all the Police officers that are now at their elbow. It is to be seen if the Sub-divisional Officers could not maintain the peace within their jurisdiction without the help of an Assistant Superintendent of Police. In certain Sub-divisions, the chief Police Officer whose help is available to the S. D. O. is an Inspector. In the heavy Sub-divisions, however, there is an Assistant Superintendent of Police. Now if the S. D. O. is relieved of all his judicial duties, he should be expected to manage with the assistance only of an Inspector. In certain districts there is not only the S. P., but an Additional S. P.

as well. If the District Officer is relieved of his work of supervision over the Magisterial Courts, he could possibly organise law and order without the co-operation of an Additional S. P. Any way it is expected that the present establishment may be curtailed to some extent at least and some funds may be released this way to be expended elsewhere.

There has been some controversy as to the powers which the Magistrates now exercise under the preventive sections of the Criminal Procedure Code (Sections 106 to 147). Even those who advocate an immediate separation of Judicial and Executive functions are not agreed as to whether these powers should be exercised exclusively by the criminal judges or should be vested partially at least in the executive officers. The Greaves Committee as well as the Mallik Committee are divided in their opinions and recommendations on this question. In the eyes of some people, these preventive powers are not really of a strictly judicial character, they are of a quasi-executive nature. An officer cannot be said to be discharging a judicial function when he asks a person suspected to be of a dangerous character to show cause why he should be bound down to keep the peace for a specified period of time. It seems rather to be an executive business. But while this aspect of the preventive power may be of an executive character, the subsequent proceedings are certainly of a judicial nature. When witnesses are examined, evidences are taken and a decision has to be arrived at, the presiding officer is of course performing a judicial duty. In any scheme for the separation of the two powers, the initiation of the proceedings under the sections of Chapter VIII of the Criminal Procedure Code may hence be left to the District and Sub-divisional Officers. The proceedings should then be sent over to a proper judicial officer who would now hear the case and issue the order. The interests of law and order should be satisfactorily served, if the executive officers have the right to call upon a person to show cause why he should not be bound down. Whether actually he should be bound down or not is, however, a purely judicial function which is likely to be misused in the hands of the executive. If the man is really

dangerous and cherishes an intention to do anything unlawful, it may be easily judged on the merits of the evidences taken by the judicial officer. It will not certainly jeopardise the interests of public peace, if nothing is proved against the man and he is discharged. If on the other hand his bad livelihood is proved or his criminal intention is brought out into relief, the presiding judge will of course bind him down to be of good behaviour. If this step is taken promptly, purposes of law and order are served thereby. This arrangement is hence conducive to the interests both of individual liberty and public peace. If, however, the executive officers themselves hear the case and issue the order, they may be guided by other extraneous factors than the merits of the evidences before them. In the name of law and order, the liberty of the citizens may not be infrequently endangered at their hands. Cases in fact are not rare in which innocent men who have somehow incurred the hostility of the executive officers have been harassed by them in a most unjust way by the exercise of these preventive powers. It is on this account that a section of the public wants to make over all the powers under the preventive sections to the independent criminal judges. They, however, by virtue of their position will be out of touch with men and things in the different localities under their jurisdiction. They are likely to be in the dark as to the movements of persons who may really mean mischief to the community. The executive officers on the other hand will have their eyes and ears constantly open. The duties of their office will keep them ever in touch with every nook and corner of the area under their charge. They are thus quite in a position to know as to which persons may be suspected of living a bad and dangerous life and harbouring a criminal design against the interests of the State. The initiation of the proceedings under the sections of Chapter VIII of the Criminal Procedure Code should therefore be left to the District and Sub-divisional Executive. But the hearing in course of which the suspected persons should have the opportunity of clearing their position and proving their innocence must take place before an independent criminal judge. The procedure

recommended for the exercise of preventive powers in Chapter VIII is equally applicable to the other preventive Chapters as well. The situation in a district may turn out at a particular time to be abnormal, due either to communal tension or to the political attitude of the people. The executive now has to remain constantly vigilant and take prompt steps to avoid and avert everything that may accentuate the situation. It may think that the presence of a certain person who is on his way to the locality may be harmful to the interests of the district. It may thereupon serve upon him a notice prohibiting him from entering the area of its jurisdiction. Now the gentleman upon whom the notice has been served may question the legality and propriety of the notice. If the hearing takes place before the executive officer himself, the notice would in all probability be declared to be in order. It is hence desirable that as soon as the notice has been served, the papers relating to the subject should be sent over to an independent judge before whom the hearing must now be made. This procedure will leave sufficient power to the executive to tackle a critical situation and at the same time make impossible the serving of panicky and unjustifiable notices that harass so much at the present time even the most well-intentioned of our public men. Similarly, if two parties come to a dispute over the possession of any piece of immoveable property and threaten thus a breach of the public peace in the locality, the executive should have the power to meet this emergency. Such disputes and such breaches of peace have been rather common in this country. It is hence desirable that the executive officers who are in direct and constant touch even with the remotest corners of their jurisdiction should be provided with the requisite powers to prevent the outbreak of the conflict.

CONCLUSION.

The Judges who preside over the criminal tribunals must necessarily be independent of all external control. Their duty is to see that the law of the land is not violated by any body, private or public. If the Executive Government, in violation of the law, encroach upon the privileges and rights of an individual, the criminal judge, on the case being referred to him, must rebuke the Government for their illegal action and give the individual back his liberty. But if this Judge were placed under executive control, he would be in a false position. The executive being his master, he would not be able to declare it to be in the wrong and set aside its action. The individual who has been injured by the executive will now have no opportunity to have the wrong righted. In British India, the executive and judicial functions were placed in the same hands in unsettled times. The officers who discharged police duties also presided over the criminal tribunals. This duality of powers was attacked when the situation in the country became comparatively normal. In 1861 was passed the Police Act which is the bed-rock of the police organisation in India to-day. It took away the police powers from all the Magistrates excepting the District Magistrate and placed them in the hands of a separate police department. The District Officer alone continued to be the link between the police and the judicial departments. The Government spokesman held out the promise at the time that this last link also would not be maintained for long. It would be snapped as early as possible. But this promise has not yet been redeemed. Not only the District Officer is still the head of both the departments of police and magistracy, but with the development of the sub-divisional system, the Sub-divisional Officers also have to exercise both the functions. The situation to-day is thus worse than in 1861. The District Magistrates in some provinces do not indeed try many cases themselves. But the Sub-divisional Officers every-

where regularly preside over the criminal tribunals. The Chief Police Officer himself thus holds the trial. But it really does not matter much if the District and Sub-divisional Officers themselves sit in judgment. The other Magistrates in the district who dispense criminal justice are completely under the control of the District Officer and look to him for promotion and advancement in the Service. They must keep him satisfied by their pliability as judicial officers, otherwise their future prospects may be blighted. Executive control over the Magisterial courts is thus direct and intimate, and as a result any person who incurs the displeasure somehow of the executive Government may be harassed and punished for nothing in different ways. People hence have got to live with the sword of Damocles hanging over their head. Their rights and privileges are at the mercy of the executive and police officers.

Over the Sessions Courts the control of the executive Government is not indeed so intimate but all the same it is there. Their tenure of office and the other conditions of their service compel them to hearken unto the wishes and opinions of the executive. They cannot afford to exercise in all cases their own discretion and independence. They have to be subservient to the Government, otherwise they may be transferred to unhealthy places, they may be debarred from promotion and in extreme cases they may be even dismissed from the service. Again many of the Sessions Judges are recruited from the Indian Civil Service. The traditions of this governing service imbue its members whether on the executive or the judicial branch with executive bias and prejudice. The I.C.S. Judges cannot as a rule take an independent view in a case which may have some political colour. They have the executive mentality and take the same attitude in such cases as the executive.

The High Courts also do not seem to have acted always up to the expectations of the people. During the last seventy years the Government have persistently tried to bring them under their control. And the I.C.S. element has throughout facilitated an entente between the Government and the High

Courts. It is time that this jarring element should be withdrawn from the High Courts.

Agitation for separating the two functions has covered almost the track of a century. Opposition to the union of police and judicial powers in the same hands began under official auspices. Until the seventies of the last century it was some officers of the Company and the Crown who tried to bring home to the Government the tyranny of the existing system and the necessity of the separation of the two powers. The publication of the historic minute of Sir James Stephen in 1872 hushed, however, all the voice of opposition in the Indian Civil Service. And henceforward the agitation for separating criminal justice from executive control passed to other platforms. But the attempts of the reformers bore no fruit. Even the great Memorial to the Secretary of State submitted in 1899 over the signature of many eminent and experienced men ended in a fiasco. The introduction of the reforms in 1919 brought of course new hope to the mind of the Indian public that the century-old grievance would now be satisfied. But this hope also turned out to be a mirage. The persistent efforts of the non-official majorities in the Provincial Legislatures have proved unavailing. The Government everywhere on one pretext or another have eluded the reform.

The grounds on which the Government have so long resisted the separation of the two powers are altogether flimsy. They carry no weight at all. The financial bogey which has been invoked for the last forty years against the reform has been proved to be without its claws. The fresh expenditure that the separation of criminal justice from executive control may involve will constitute no serious strain on the public purse. It can easily be met. Nor is the objection that the principle of separation is not suited to the genius of an eastern people any way material and valid. The real objection which the Government Members generally want to keep concealed but which now and again peeps out in their utterances is, of course, not unknown to the people. The present system gives the Government ample powers to tackle any inconvenient

situation and bring to book any inconvenient person. If the criminal courts become independent of the executive influence and control, the Government will lose these extraordinary powers. It is here that the shoe pinches and it is here that the real objection lies. The Government are not ready to forego these powers.

But it is high time that the separation of criminal justice from executive authority should be frankly undertaken. The progress towards democracy that is being made in the country will be absolutely hollow, if the liberty of the people be at the mercy of the executive officers. The reform which is over-due should not be delayed any longer. Criminal justice in all its grades should be immediately liberated from the executive shackles.

APPENDIX

(Some recent cases illustrating Magisterial vagaries.)

A

The judgment of the Calcutta High Court on the 16th December, 1930, setting aside the order of the Additional District Magistrate of Midnapur against Mr. B. N. Sasmal under Section 144 Cr. P. C. points out afresh that the Magistrates under the inspiration of the police are ever ready to twist the law in order to restrict the activities of inconvenient persons. Midnapur is the home district of Mr. Sasmal. He has also a landed estate in the district. He, as a barrister, practises no doubt before the High Court in Calcutta, but now and again on professional calls as also for looking to the management of his property, he has to visit his native district. Mr. Sasmal has never been *persona grata* with the police authorities, rather he has been since the days of the non-co-operation movement the *bet noire* of the guardians of law and order. He has not of course cast in his lot with the civil disobedience movement, but all the same the police looks upon his presence in the Midnapur district in these troublous times as inconvenient. His influence over the people there handicaps the police authorities. It is hence desirable, the police officers conclude, that Mr. Sasmal should be sent away from the Midnapur district. Confidential reports were accordingly submitted to the District Magistrate against Mr. Sasmal and the Additional District Magistrate issued an order on the strength of these reports under section 144 Cr. P. C. directing Mr. Sasmal "to abstain from staying at the town of Midnapur or any part of the district and to leave the district by the next available train." Mr. Sasmal contested the legality and propriety of the order under section 144. But the Additional District Magistrate upheld it by adverting to facts and arguments which give a dark picture of Mr. Sasmal as a public man. But he made no

attempt to show that section 144 could be legally applied to the case. The case was now carried to the Court of the District and Sessions Judge of Midnapur who looked upon the order as illegal and referred the case to the High Court with a recommendation for its reversal. The Criminal Bench of the High Court constituted by the Chief Justice and Mr. Justice Graham held the order to be bad and illegal and quashed it accordingly. The Chief Justice in delivering the judgment of the Court, observed that Section 144 gave power to order a person to abstain from doing a certain act. The Magistrate in Midnapur did not ask Mr. Sasmal to abstain from a certain act but to do a positive act—to leave the district in which his own house and landed estate were located and that too by the next available train. "I am quite clear," his Lordship continues, "that it was never intended by Section 144 of the Criminal Procedure Code that a man might be ordered to remove himself not only from his own house but from his own district, and to do so by the next available train." The Additional District Magistrate had thus twisted the law to serve the interests of the police and but for the correct attitude of the superior courts, the liberty of Mr. Sasmal would have been illegally restricted.

B

Another recent case (*Lachmi Devi and others* v. *the King-Emperor*) disposed of by the Calcutta High Court illustrates the powerlessness of the Magistrates to protect innocent citizens from the vagaries of the executive police. On April 21, 1930, an order was promulgated by the Police Commissioner of Calcutta prohibiting all processions in the city and suburbs without a licence, with the sanction of the Governor-in-Council to extend the operation of the order beyond seven days. On the morning of November 11, 1930, Lachmi Devi and five other ladies were alleged to have formed a singing party in Chitpur Road without a licence. On charges of having organised a procession for furthering the interests of the civil disobedience

movement, in violation of a lawfully promulgated order, and having obstructed traffic, the ladies were arrested by the Calcutta police and sent up for trial under seection 188 I. P. C. and 62-A of the Calcutta Police Act. The fourth Presidency Magistrate in whose court the trial took place accepted the contention of the police, found the accusted guilty and sentenced them all to simple imprisonment for four months. On a motion being made in the High Court, the case came to be heard by the Criminal Bench, constituted by the Chief Justice and Mr. Justice Mallik. On the 8th December 1930, the judgment of the court was delivered by the Chief Justice who looked upon the order which was the basis of the prosecution as altogether bad. The point at issue was whether subsection 4 of section 62-A of the Calcutta Police Act empowered the Police Commissioner to issue a general order prohibiting all public processions. "In my opinion", said his Lordship, "no such power was contemplated by the statute." He could prohibit a particular procession or some processions upon a particular occasion for the preservation of public peace or safety. But a general order prohibiting all public processions was an arrogation of power not contemplated by the statute in question. The Chief Justice also observed that the trying Magistrate had further failed to see that a mere disobedience of an order did not constitute an offence under section 188 I. P. C. It must have certain consequences or tend to have certain consequences before it would become an offence punishable under section 188 I. P. C. In the present case, the Chief Justice observed, the evidences did not point to any such consequences or any tendency to such consequences. He accordingly quashed the sentences and acquitted the accused.

C

How section 144 Cr. P. C. is twisted to suit the exigencies of police administration has been testified to by a recent judgment of the Calcutta High Court. A judgment of the Madras

High Court similarly brings out into relief the frivolous application of the section by Magistrates invested with executive responsibility. A few months ago, the District Magistrate of Guntur came to suffer from Gandhi-cap-phobia. He was determined to stamp out all Gandhi-caps from the town of Guntur. To fulfil his objective, he issued an order under section 144 to the effect that all people within the municipal town must abstain from wearing Gandhi-caps. The matter was carried over to the High Court of Madras, where it came to be dealt with by Mr. Justice Pandalay. He laid down that the object of section 144 was to protect public peace. He, however, could not see what danger was threatened to public tranquillity by the wearing of Gandhi-caps. The reasoning of the District Magistrate that the wearing of such caps was a symbol of sympathy with the civil disobedience movement was unacceptable. He further added that the order instead of preventing any breach of the public peace, was likely to upset the people's mind and cause thereby some disturbance. The order was unnecessary and uncalled for. He, therefore, set it aside in the interests of the public.

D

How in political cases the Magistrates seldom dare to be fare and impartial is illustrated by a recent case which the High Court of Lahore dealt with, in exercise of its powers of revision. By a notification on the 3rd of July, 1930, the Congress Committee of Gujranwalla was declared an "unlawful association," within the meaning of section 16 of Act XIV of 1908. On the 5th of July, a Sub-Inspector of Police lodged a complaint in the Magistrate's court at Gujranwalla against Lala Pars Ram Dang alleging that he was a member of the Gujranwalla Congress Committee and praying that he be dealt with in accordance with the law. A warrant was now issued and the Lala was taken into custody. His case came up for hearing in the court of the Additional District Magistrate,

Sardar Bishan Singh. The accused did not take part in the proceedings. The prosecution examined three witnesses, none of whom deposed that after the declaration of the Gujranwalla Congress Committee as an unlawful association the accused did any overt act which might prove that he was still a member of the body. The prosecution also relied upon three documents which later on came to be characterised as mere waste-paper by the Sessions Judge. The trying Magistrate, however, gave no consideration to these facts. He accepted the contention of the police, convicted the accused and sentenced him to three months' imprisonment with hard labour under section 17 (1) of the Criminal Law Amendment Act (1908). The illegality of the sentence was brought to the notice of the Sessions Judge in a petition by a member of the local bar. The Sessions Judge, after hearing both the petitioner and the Public Prosecutor, referred the case to the High Court on revision side. The revision came up for hearing before Mr. Justice Teckchand. The three documents on which the prosecution had relied in the Magistrate's court were not only no better than mere waste-paper, as the Sessions Judge had pointed out, but what is more, taken separately or collectively, they did not prove any way that Pars Ram Dang was a member of the Gujranwalla Congress Committee either before or after the issue of the notification. The oral evidence of the Sub-Inspector of Police and the two Constables also did not prove that they had any personal knowledge of the accused's membership of the Gujranwalla Congress Committee. None of them moreover deposed that after the declaration of this body as unlawful, the accused had done any overt act which might establish his connection with the unlawful association. The Assistant Legal Remembrancer argued that if it was shown that the convict was a member of the Gujranwalla Congress Committee before the day of the notification, it was not necessary for the prosecution to establish that he did any overt act as such, after the Committee had been declared illegal. His contention was that every person who was a member of the association at the moment of its

being declared illegal automatically became guilty under section 17 (1). Mr. Justice Teckchand, however, thought otherwise. If this contention was accepted, he observed, "it would lead to manifest absurdity, as it would be tantamount to giving retrospective effect to the Statute so as to punish a person for an act done at a time when no illegality attached to it." "Ordinary rules of justice and commonsense require," he continued, "that those who were connected with the association at the time it was declared unlawful should be given *a locus poententiae* to withdraw from its membership within a reasonable time of its notification as such." The conviction, he thought, "cannot be sustained either on facts or in law." "The case appears to have been conducted and tried throughout," he added, "with very little regard for the rules of evidence and of procedure prescribed by law." He, accordingly, accepted the reference, set aside the conviction and acquitted the convict.

INDEX

ERRATA.

Page 1, line 19, for lew read law.
Page 17, line 11, for Distrct read District.
Page 31, line 21, for Magistrates read Magistrate.
Page 39, line 4, for list read lists.
Page 51, lines 12 and 23, for Reginal read Reginald.
Page 64, line 15, for Easau read Esau.
Page 69, line 18, for clercial read clerical.
Page 72, line 28, for does read did.
Page 94, line 28, for drunkard read drunken.
Page 119, line 3, for has read had.
Page 140, line 24, for immoveable read immovable.